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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2009

John and JoAnne Lawson,
Petitioners,

v.

Citrus County, A Political Subdivision
of the State of Florida,
Respondents.

On Petition for a Writ of Certiorari to the
District Court of Appeal of Florida
Fifth District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Under the law as restated in Caperton v. Massey Coal Company, 556 U.S. _____, 129 S.Ct. 2252 (2009), may an attorney both represent a local government as its legal counsel in land use cases, and serve as a neutral adjudicator in code enforcement proceedings in which the same local government is the Petitioner?

II May a person be convicted for an alleged violation when the violation on which the conviction is based is neither set forth in the charging instrument nor raised at any time prior to the final hearing on the charged violations?

III Does the due process clause of the Fifth Amendment to the Constitution of the United States, as applied to the states through the Fourteenth Amendment, require that land development controls have a provision by which a land owner may seek a variance to those controls – thus avoiding a great and needless hardship entirely disproportionate to the benefit of the control?

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Petitioners state that there is no parent or publicly held company having any interest in this matter.

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OPINIONS BELOW

The Order of the Fifth District Court of Appeal of Florida Denying Motion for Rehearing, Motion for Rehearing En Banc and Alternative Request for Issuance of Written Opinion, issued February 25, 2010, and the opinion of the Fifth District Court of Appeal of Florida denying Petitioners' Petition for Writ of Certiorari to that Court, issued January 19, 2010, (Appendices F and G), are presently unreported. The opinion of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Citrus County, Florida, (Appendix E) was rendered on August 4, 2009. This opinion is also presently unreported. The relevant Orders and Opinion are reproduced in the Appendices.

STATEMENT OF JURISDICTION

The District Court of Appeal of Florida, Fifth District, rendered its Order Denying Motion for Rehearing, Motion for Rehearing En Banc and Alternative Request for Issuance of Written Opinion on February 25, 2010. The decision of February 25, 2010 is a final judgment rendered by the highest court of Florida in which a decision could be had. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (a), providing for the filing of petitions for certiorari

from the highest court of a state from which a decision may be had.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part: "... nor shall any person be ... deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States provides in relevant part: " ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY AND LOCAL PROVISIONS INVOLVED

Chapter 162, Florida Statutes.

This Chapter creates a process by which local ordinances may be enforced by either a Code Enforcement Board or by a "Code Enforcement Special

Master," in order to "provide an equitable, expeditious, effective, and inexpensive method of enforcing any codes and ordinances in force in counties and municipalities, where a pending or repeated violation continues to exist." (§162.02 F.S.)

Citrus County Comprehensive Plan.

A comprehensive plan in Florida is typically a policy document setting mid-and long-term goals, objectives and policies for the development of land, infrastructure and services: it is akin to a constitution which is implemented by statutes and decisional law. The Citrus County Comprehensive Plan also contains certain numeric standards, one of which is at issue herein, as will be discussed infra.

Citrus County Land Development Code.

The Citrus County Land Development Code is intended to implement the Comprehensive Plan and provide detailed regulations for the development of land. Specifically relevant are the following sections:

– 2020: requiring the issuance of a building

permit for the construction of a fence. [1]

- 2021: Requiring a permit for a change of use.
- 2120: Requiring approvals by the Citrus County Planning and Development Review Board
- 2321: Requiring building permits. [2]
- 4120 Requiring a buffer between buildings and waterways.
- 4667. E. 1 Establishing the County process for approving applications to the State of Florida for the sale of alcoholic beverages.

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[1] This issue and a number of other areas of non-compliance with various Citrus County Technical Codes – not raised in the Administrative Complaint – were resolved over the course of the proceedings so that Petitioners' property was in compliance with the code issues raised by Citrus County over the course of these proceedings, except for the change of use issue and the comprehensive plan setback requirement raised for the first time in the final hearing before the Special master.

[2] See footnote 1.

STATEMENT OF THE CASE

For the purposes of the Federal Constitutional Questions Presented, (page I, supra,) the following are the relevant facts.

This Petition involves a story far too common in today's economic climate. Businessman, in this case a fisherman, tries everything possible to keep a historically significant Citrus County, Florida, fish house commercially viable, preserving a critical component of Florida history and providing valuable employment and other benefits to the community, even though the fish are gone. Fighting the trend of a severe decline of fish houses along the Gulf Coast, the property located in Homosassa, Florida, known as the Cedar Key Fish House, was established in 1962 and still survives today.

The Cedar Key Fish House was credited with introducing mullet and mullet roe to the world. Shrimp, stone crabs, oysters, scallops, and other fish were sold retail and wholesale, and alcoholic beverages were provided to thirsty fishermen and their entourage, reflecting an even more widely practiced and centuries old historical fact.

Over the years, a number of incomplete, inconsistent and dismally "informal" zoning and land use designations attached to the subject property. Ultimately, the fish house obtained a vested rights determination rendering it a recognized commercial use. In the belief that the desired plans for the property were carrying forward characteristics that had always been present, the Petitioners sought to obtain an alcoholic beverage license allowing fisherman or individuals simply wanting to enjoy a meal and a drink to do so in view of the natural Florida splendor of the Homosassa River. The local "zoning authority governing your business location" signed off on the State of Florida alcoholic beverage form, stating that "The location complies with the zoning requirements for the sale of alcoholic beverages or wholesale tobacco products pursuant to this application..."

Subsequent to receiving the alcoholic beverage entitlement, the Petitioners spent vast amounts of time, money, and effort improving their property, including improving the historical appearance of the property by constructing a "chickee" hut, which was constructed by the Seminole Indian Tribe in accordance with all applicable state statutes and all building code exceptions attendant thereto (§ 553.73(9), Fla. Stat.).

On September 28, 2007, Citrus County issued Petitioners a "Notice of Violation," alleging that Petitioners had changed the use of a portion of their structure without the required permits, and that Petitioners had constructed a "commercial fence" without a building permit. These "violations" were allegedly precipitated by "complaints" suspected of being underwritten by competitors, but the Petitioners agreed to go through whatever reasonable administrative requirements were necessary to correct the situation.

These efforts, efforts experienced in every community throughout the country, form the basis of the legal issues presented herein. This matter goes to the heart of how quasi-judicial code enforcement matters should be adjudicated, by whom (since there is a trend to allow recently resigned or even sitting government attorneys to participate in prosecuting, advising or even adjudicating such matters), on what "charges" (many such hearings have no prohibition against last minute amendments to the nature of the violations at issue), and whether a variance process should exist to protect those targeted by such last minute modifications to charges to provide an opportunity to prevent the undue hardships caused by an unbending application of land use regulations.

On November 2, 2007, Citrus County issued an "Administrative Complaint and Notice of Hearing," re-alleging the claims from the "Notice of Violation." (Appendix A-2).

Chapter 162, Florida Statutes provides for the enforcement of county and municipal ordinances through a "code enforcement" process, without requiring a local government to prove criminal charges or to seek injunctive or other equitable relief. The purpose of the chapter is to set forth on pages 2 - 3, supra.

Citrus County has elected to avail itself of the procedures permitted and established by Chapter 162. At the time of the commencement of this action, Citrus County utilized an appointed Code Enforcement Board comprised of citizens of the County. After the first proceeding before the appointed, citizen, board, Citrus County changed its procedure to utilize an appointed "Special Master" as permitted by the statute.

The alleged violation was first heard by the Code Enforcement Board on December 19, 2007, and the Board made brief and extremely conclusory findings of fact and conclusions of law and found Petitioners to be "guilty" of the alleged violations. It was clear that the violations could be cured by

amendments to the County's land use controls, and all evidence supported the favorable consideration of these amendments. Accordingly, the Board allowed Petitioners time to cure the violations with a fine to be imposed if the violations were not cured. (Appendix B).

Thereafter, Citrus County changed from the citizen Code Enforcement Board to a single "Special Master," with former Assistant County Attorney, and still counsel for Citrus County, Michele Lieberman, serving as the Special Master in this case. Ms. Lieberman heard the matter several times during 2008 as Petitioners remedied one of the two charges with an "after-the-fact" permit for the fence and as Petitioners attempted to wend their way through the morass of illegal (Appendix C at 12a - 13a; Appendix E at 24a, 27a) and incoherent Citrus County land use regulations to bring their property into compliance with the relevant codes.

As set out in the Circuit Court's Final Order (Appendix E at 27a), these efforts came to naught for a variety of reasons. Accordingly, Ms. Lieberman entered "Amended Findings of Fact, Conclusions of Law and Order," (Appendix C).

Included in Ms. Liberman's final order was the finding:

> Pursuant to testimony set forth by Citrus County, the structure sits 8 feet from the water's edge. The Citrus County Comprehensive Plan, however, requires that all structures be a minimum of 15 feet from the water's edge. (Appendix C at 12a).

This "finding" was critical to Ms. Lieberman's final decision as she referenced it in ¶¶ 2, 3 and 5 of her Conclusions of Law (Appendix C at 13a - 14a).

As evidenced by the charging instruments (Appendix A), this critical allegation was not raised in those instruments. The Code Enforcement Special Master acknowledged that this issue was being raised for the first time, when she entered her final order in this matter (Appendix C at 12a, "Testimony previously provided by the County ... had not revealed the information regarding the setback, ..." and at 14a: "... testimony now presented ..." [Emphasis Added].

Equally as important, as brief and conclusory as the original Code Enforcement Board decision was (Appendix B), it also made no reference to the charge on which Petitioners were ultimately "convicted" – the alleged non-compliance with the Comprehensive Plan.

Further, as the Circuit Court noted (Appendix E, at 28a): "... The Special Master remarked that the

County provided new testimony ..." [Emphasis Added]). This "new testimony" was the issue on which Petitioners' "conviction" was based – an alleged violation of a numeric requirement of the Citrus County Comprehensive Plan – which was raised for the first time in the final hearing before Ms. Lieberman. (In fact, as demonstrated by Appendix I, the allegation is not true as a matter of fact: "At the point closest to the water, the Tiki [Chickee] hut is 15 feet 3 inches away from the water," (Appendix I at 59a.)

Ms. Lieberman then entered her Amended Findings of Fact, Conclusions of Law and Order, finding Petitioners to be in violation of the Citrus County Comprehensive Plan – a point never before raised – thus finding Petitioners guilty of an incurable violation of the Citrus County Land Development Code. Finding the alleged violation by Petitioners to be incurable as a result of the never before raised numeric standard of the Comprehensive Plan, Ms. Lieberman ordered Petitioners to close their business or else face fines that could lead to a lien being imposed on Petitioners' property, the imposition of which lien could lead to the County's foreclosing on Petitioners' property, truly a penal sanction.

At this point, Petitioners were "convicted" by a presumptively neutral magistrate of a violation with

which they were not charged, and for which violation there was no legal means of obtaining a variance. This alleged "violation" arose from Citrus County's approval of the issuance of an alcoholic beverage license by the State of Florida (Appendix E at 24a, ¶ 4), and also arose from Citrus County's void effort to amend its Comprehensive Plan (Appendix E at 27a, ¶ 10).

A direct appeal as a matter of right from Ms. Lieberman's order was taken to the Citrus County Circuit Court, pursuant to § 162.11, F.S. Petitioners submitted their initial brief and Citrus County filed an answer brief. During the preparation of Petitioners' Reply Brief, it came to light that the supposedly neutral Code Enforcement Special Master -- Ms. Lieberman – was also counsel to the Petitioner below – Citrus County. [3] Nowhere on the record, or in the proceedings to this point, was Ms. Lieberman's clear conflict of interest apparent.

This conflict manifests itself when one notes that in Appendices A-2, B and C, Citrus County is identified as "Petitioner" in the proceedings while Citrus County is identified as the Appellee in Save the

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[3] Save the Homosassa River Alliance v. Citrus County, 2 So.3d 329 (Fla. 5th DCA 2008); Citrus County v. Halls River Development, 8 So.3d 413 (Fla. 5th DCA 2009).

Homosassa and as the Appellant in Halls River . Yet the Circuit Court, while acknowledging the issue to be a due process issue (Appendix E at 38a), dismissed this clear conflict as "mere speculation" (Appendix E at 39a), despite the fact that Petitioners provided the Court with both a summary of Ms. Lieberman's invoices to "Petitioner" – the County – as her client (Appendix H), and with the underlying detailed invoices. [4]

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[4] The actual invoices along with the summary found in Appendix H were submitted to the Circuit Court and then became part of the Appendices in the Petition to the Fifth District Court of Appeal.

Ms. Lieberman had recently retired as an Assistant County Attorney for Citrus County and went into private practice with the County as a client. As evidenced by the second column in the Appendix, she apparently did not number her invoices in the early days of her private practice.

The last column on the chart identifies the page numbers in the electronic copies of the invoices as they were submitted below. On June 30, 2008, a second invoice charged Citrus County for Ms. Lieberman's services as the Code Enforcement Special Master. This invoice revealed an hour and a half ex parte meeting with County staff; an ex parte communication that is constitutionally problematic.

Once they realized Ms. Lieberman's dual role as counsel for the County during the same time she was acting as "Special Master" over proceedings involving the County as a party, they made a public records request for the invoices submitted to Citrus County by Ms. Lieberman, receiving copies of a number of invoices Ms. Lieberman sent to the County for "services rendered."

Petitioners raised this issue before the Circuit Court, both in their Reply Brief and in a Motion to Abate and Remand with Instructions. The issue of Ms. Lieberman's disqualification was raised in the terms of both a statutory prohibition against a local government attorney advising a citizen Code Enforcement Board [5] and on Constitutional Due Process Grounds. The Circuit Court denied the Motion to Abate and Remand, but allowed Petitioners to raise this fundamental issue, not theretofore apparent on the record, and ruled that the issue would be given "due consideration." (Appendix D at 19a, ¶ 1.)

The Circuit Court ultimately sustained Ms. Lieberman's ruling on all issues, including the issue of

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[5] Section 162.05(5), F.S. It defies credulity that a local government attorney may not advise a citizen Code Enforcement Board but may sit as such Board.

whether Ms. Lieberman was barred from occupying the dual role of counsel to Citrus County and adjudicator of Citrus County's petition before her as a purportedly neutral special master. [6]

Under Florida law, the next step in the appeal was a discretionary Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fifth District. That Petition was filed, [7] followed by the filing of Answer and Reply Briefs.

The District Court of Appeal denied the Petition for Writ of Certiorari without opinion on January 19, 2010 (Appendix F). The same Court denied Petitioners' Motion for Rehearing, Motion for Rehearing En Banc and Alternative Request for Written Opinion on February 25, 2010. [8]

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[6] When the matter returned to the Special Master from the Fifth District Court of Appeal, this conflict of interest issue was raised. Ms. Lieberman took the issue under advisement and has not yet ruled on it.

[7] And a corresponding Appendix.

[8] Without a written opinion no appeal to the Supreme Court of Florida is permitted: R. J. Reynolds Tobacco Co. v. Kenyon, 882 So.2d 986 (Fla. 2004). Rule 9.330, Fla.R.App.P. permits a party to an appeal to request

The February 25, 2010, Order of the District Court was the final order of any state court from which an order might be had. This Petition for Writ of Certiorari ensued.

REASONS FOR GRANTING THE PETITION

As can be seen in the Circuit Court Order, numerous issues were considered in the Citrus County code enforcement process, and were addressed by the Special Master and subsequently by the Circuit Court. Several of these issues have constitutional implications, but the following three issues clearly merit consideration and resolution by this Court.

This case involves nothing less important than the question of whether the Constitutional mandates of the Bill of Rights apply to the numerous code enforcement proceedings that occur throughout this country every day. Are respondents in code enforcement proceedings entitled to be heard by neutral adjudicators? Are they entitled to be made aware of all the charges on which they might be

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the District Court to issue a written opinion which would permit review by the Supreme Court of Florida.

convicted? Must the regulations under which they were charged have provisions for obtaining a variance?

These are broad legal questions, the resolution of which will affect many persons other than the actual parties. As land use laws become more complex and restrictive, and as code enforcement processes become more common [9] and less formal, moving away from criminal prosecutions and equitable relief, three

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[9] See, e.g. Alabama Statutes, § 36-25-9; Arkansas Code, § 5-54-104; California Health and Safety Code, § 17998.2; Connecticut Statutes, § 8-208; Delaware Code, 10 Del.C. § 2902; Georgia Code, § 36-74-42l; Idaho Statutes, § 39-4116; Illinois Statutes, 55 ILCS 5/5-41020; Kansas Statutes, § 19-4708; Kentucky Revised Statutes, § 65.8801, et.seq.; Louisiana Revised Statutes, § 40:1730.35; Maine Statutes, 30-A, M.R.S.A., § 4451; Maryland Code, § 14-123; General Laws of Massachusetts, c. 14A; Missouri Statutes, § 82, 1029; Montana Statutes, § 50-60-302; Nevada Revised Statutes, § 341.105; New Jersey Statutes, § 2A-1861.1g; New York Consolidated Laws, C. 47, Art. 2; North Carolina, § 143-151-13, N.C.G.S.; Tennessee Code, § 13-6-106; Texas Statutes, § 1952.103. The foregoing are not necessarily the enabling statutes in each state; rather they are statutory references that establish that each of the listed states uses a code enforcement scheme apart from criminal proceedings or proceedings in equity for the enforcement of local government ordinances.

critical due process issues have emerged. These issues are likely to recur time and again, in Florida and in other states implementing these less formal code enforcement processes. The Court's guidance in resolving these matters is required, since critical property rights are clearly implicated in these proceedings.

I. THE DUE PROCESS CLAUSE REQUIRES ADJUDICATORS TO BE NEUTRAL, FAIR AND IMPARTIAL

The Fifth Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment: Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 234-235 (1897) imposes a broad requirement for substantive and procedural due process in state action against individuals. Included in these due process guarantees is the requirement for a fair and impartial adjudicator in all state actions against individuals.

A "fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). This requirement applies to administrative agencies which adjudicate as well as to

courts. Gibson v. Berryhill, 411 U.S. 564, 579 (1973). Withrow v. Larkin, 421 U.S. 35, 46 - 47 (1975)

In In re Murchison, supra, the Court, in addition to citing and relying on Tumey v. Ohio, 273 U.S. 510 (1927), also, citing to Offutt v. United States, 348 U.S. 11 (1954), noted: "But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" Murchison at 136.

In its last term, this Court decided Caperton v. A. T. Massey Coal Company, ___ U.S. ___, 129 S.Ct. 2252 (2009), [10] a case considering the issue of campaign contributions to elected judges. There is no question that the facts in Caperton were extreme and the Court noted the extreme nature of the facts and, to an extent, limited its opinion to those "extreme" facts, although the Court also noted that Courts had generally been capable of applying the "extreme" facts of earlier precedents to the less extreme facts that came before the lower courts. (Id., 129 S.Ct. 2266).

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[10] Caperton was, of course, cited in briefs and pleadings prepared subsequent to its issuance, but Petitioners first raised this issue with the Circuit Court on May 4, 2009, slightly more than a month prior to Caperton being decided.

Notwithstanding this "limitation" to "extreme" cases, Justice Kennedy, writing for the Court, noted:

> Under our precedents there are objective standards that require recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Withrow v. Larkin, 421 U. S. 35, 47 (1975). (Id., 129 S.Ct. 2257)
>
> It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." [In re] Murchison, [349 U. S. 136 (1955)], supra, at 136. ...

Justice Kennedy proceeded to describe the Tumey decision:

> The Tumey Court concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case. Ibid. This rule reflects the maxim that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison); see Frank, Disqualification of Judges, 56

> Yale L. J. 605, 611-612 (1947) (same). ... (Id., 129 S.Ct. 2259).

Justice Kennedy then gave two examples of when recusal is required. First was where a judge had a financial interest in the outcome of a case -- the problem in Tumey.:

> The Court held that the Due Process Clause required disqualification "both because of [the mayor-judge's] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." Id., at 535. It so held despite observing that "[t]here are doubtless mayors who would not allow such a consideration as $12 [11] costs in each case to affect their judgment in it." Id., at 532. The Court articulated the controlling principle:
>
> > "Every procedure which would offer a possible temptation to the average man as a judge to forget

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Approximately $147 in 2009 – a mere pittance compared to the $25,739 billed by Ms. Lieberman to her client – Citrus County – for her services in the Fifth District Court of Appeal, performed at the same time she adjudicated her client's petitions as the Code Enforcement Special Master.

> the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Ibid.

Justice Kennedy further explained that the Court was: "... concerned with a more general concept of interests that tempt adjudicators to disregard neutrality." (Ibid.).

Citing to Aetna Life Ins. Co. v. Lavoie, 475 U. S. 813 (1986), the Caperton Court went on to hold in the second example:

> The Court stressed that it was "not required to decide whether in fact [the justice] was influenced." Id., at 825. The proper constitutional inquiry is "whether sitting on the case then before the Supreme Court of Alabama '"would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."'" Ibid. (quoting Monroeville, supra, at 60, in turn quoting Tumey, supra, at 532). The Court under-scored that "what degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.'" 475 U. S., at 822

> (quoting Murchison, 349 U. S., at 136). In the Court's view, however, it was important that the test have an objective component. (Id., 129 S.Ct. 2261)

The Caperton Court further established the critical nature of the issue. Could a former Assistant County Attorney, much less one doing legal work for the County at the same time, actually be sufficiently unbiased to sit in judgment of disputes where the County is a party. This Court stated:

> ... the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. See Tumey, 273 U. S., at 532; Mayberry, 400 U. S., at 465-466; Lavoie, 475 U. S., at 825. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Withrow, 421 U. S., at 47. (Id., 129 S.Ct. 2263)

Thus, the Caperton Court repeated that proof of actual bias is not required. (Id., 129 S.Ct. 2263)

The Court in Caperton relied on Tumey v. Ohio, supra, which is particularly helpful, as follows:

> ... But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case. (Id., at 523).

Chapter 162, F.S., specifically states that proceedings under that chapter are not criminal in nature. But that disclaimer does not change the fact that Petitioners are at risk of being deprived of their property through the operation of lien which could lead to foreclosure on their property. Said lien may be imposed as the result of the "conviction" of Petitioners by a special master who had a direct and substantial pecuniary interest in ruling for her client – the County which was the petitioner before her in the subject proceeding.

The Tumey Court went on to hold: "... in analogous cases it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable.

[Citations omitted, Emphasis Added] (Id., at 524). Ms. Lieberman's pecuniary interest was hardly "slight;" she billed Citrus County $25,739 for her services as the County's advocate before the District Court of Appeal during the same time she adjudicated the Petitioners' case.

Furthermore, a proceeding before a less than impartial judge is not a "harmless constitutional error:" "This Court previously has declined to apply harmless error analysis to certain categories of constitutional error. See, e.g., ... [citing Tumey] (trial before an impartial judge)." Dawson v. Delaware, 503 U.S. 159 (1992) at 169, Blackmun, J., concurring. See, also, Arizona v. Fulminante, 499 U.S. 279 (1991) at 309; Young v. U.S. ex rel. Vuitton et Fils S. A., 481 U.S. 787 (1987) at 810.

In Edwards v. Balisok, 520 U.S. 641, 647 (1997), Tumey was applied to hearing officers. In Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California 508 U.S. 602 (1993), the Court, after citing Tumey, held:

> ... Before one may be deprived of a protected interest, whether in a criminal or civil setting, see Marshall v. Jerrico, Inc., 446 U.S. 238, 242, and n. 2 (1980), one is entitled as a matter of due process

> of law to an adjudicator who is not in a situation "'which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true. . . .'" Ward, supra, at 60 (quoting Tumey, supra, at 532). Even appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator. 409 U.S., at 61.
>
> "[J]ustice," indeed, "must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." Marshall v. Jerrico, Inc., supra, at 243 (citations and internal quotation marks omitted). This, too, is no less true where a private party is given statutory authority to adjudicate a dispute, and we will assume that the [possibility] of bias, if only that stemming from the trustees' statutory role and fiduciary obligation, would suffice to bar the trustees from serving as adjudicators of Concrete Pipe's withdrawal liability. Id., at 617 - 618.

And it must be again stressed that Tumey also applies to "quasi-judicial" proceedings: Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) at 248 as well as to

"administrative proceedings." Withrow, supra at 46; Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

Tumey was discussed with a critical eye toward conflicts of interest created by pecuniary variables:

> ... this Court held that a conviction could not stand because a small part of the judge's income consisted of court fees collected from convicted defendants. Although in Tumey it appeared the amount of the judge's compensation actually depended on whether he decided for one side or the other, that is too small a distinction to allow this manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in this case. ... Commonwealth Coatings Corp. v. Continental Casualty Co. et al. 393 U.S. 145, 148 (1968)

In the instant case, Ms. Lieberman had a statutory, ethical, and fiduciary obligation to her client, Citrus County, in pursuing its appeals before the Court of Appeal of Florida, and she could neither appear nor serve as a neutral adjudicator of petitions brought by her otherwise "client" in code enforcement proceedings where she sat as a "Special Master".

In Marshall v. Jerrico, supra, the Court (citing Ward and Tumey) clearly identified the applicability of these ethical considerations to quasi-judicial proceedings: "The rigid requirements of Tumey and Ward, designed for officials performing judicial or quasi-judicial functions, ... (at 248) [Emphasis Added], thereby applying these standards to cases such as the one at issue. The Court further noted that the requirement for a neutral judge was a "strict" requirement (at 250) and that impartiality: "... serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime; ..."

Chief Justice Roberts summarized the law going back to Tumey in 1927, and re-stated in Caperton, supra, as: being the showing of "a probability of bias." Id., at 2267. Since the Court specifically noted that "actual bias" need not be proven, (Id., at 2263), this summary is clearly correct.

> The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge. Tumey, supra at 535

As "less formal" code enforcement proceedings become more commonplace, and as proceedings all over the country utilize former or current municipal, county, or "corporation" attorneys, constitutional

guidance for these procedures is required. Included in this guidance should be a clear mandate from this Court as to the need for impartial adjudicators.

This Petition provides the Court with the opportunity to speak to this issue of increasing national importance.

II. THE DUE PROCESS CLAUSE REQUIRES THAT ANY CONVICTION BE BASED ON CHARGES MADE IN THE CHARGING INSTRUMENT

It is beyond dispute that Petitioners' "conviction" was based on information not included in the original or any charging instruments (Appendix A), or previously raised in the Code Enforcement proceedings:

> ... Testimony previously provided by the County at prior hearings had not revealed the information regarding the setback and recommended denial of the Planned Development Overlay application. (Appendix C at 12a).

The Circuit Court also notes that this issue was not raised previously:

> ... The Special Master remarked that the County provided new testimony that the structure sits 8 feet from the water's edge but the Comprehensive Plan requires a minimum of a 15 foot setback. ... (Appendix E at 28a). [Emphasis Added]

The import of this new charge is clear:

> ...As such, Respondents' new use of the structure must comply with the County's Comprehensive Plan, including the 15 foot setback requirement. ... (Appendix C at 13a).

As noted, supra and Appendix 1, as a matter of fact the setback conforms to the requirement – a point Petitioners could have made if they had known of the existence of the charge.

Thus, Petitioners were convicted by the Special Master based on a charge that both the Special Master and the reviewing Court acknowledge was made for the first time at the last hearing before the Special Master.

In addition to stating with clarity exactly who may adjudicate matters such as these, it is equally as important for the Court to set a rational standard on

what may be adjudicated and prevent manifest departures from due process such as occurred in the instant case.

This Court has long held that a person may not be convicted on an offense with which he is not charged. This fundamental requirement was espoused in two decisions announced on one day in 1948.

In Cole v. Arkansas, 333 U.S. 196 (1948), the Court stated:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In re Oliver, 333 U.S. 257, 273, decided today, and cases there cited. ... It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. De Jonge v. Oregon, 299 U.S. 353, 362. Id., at 201.

The Constitutional mandate that no person may be convicted of an offense with which he was not

charged could not be more clearly expressed. In Jackson v. Virginia, 443 U.S. 307 (1979), the Court, relying on Cole stated:

> It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. Cole v. Arkansas, 333 U.S. 196, 201; Presnell v. Georgia, 439 U.S. 14. These standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend. E.g., Hovey v. Elliott, 167 U.S. 409, 416-420. ... Id., at 314.

Earlier, the Court held:

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. See Eaton v. Tulsa, 415 U.S. 697, 698-699 (1974) (per curiam); Garner v. Louisiana, 368 U.S. 157, 163-164 (1961); Cole v. Arkansas, 333 U.S. 196, 201 (1948); De Jonge v. Oregon, 299 U.S.

> 353, 362 (1937). ... Dunn v. United States 441 U.S. 100, 106 - 107 (1979).

The principle of Cole and its progeny was applied to a context other than a criminal charge – the disbarment of a lawyer – in In re Ruffalo, 390 U.S. 544 (1968), modified on other grounds, 392 U.S. 919, (1968). The Court held, in a closely analogous situation:

> These are adversary proceedings of a quasi-criminal nature. Cf. In re Gault, 387 U.S. 1, 33. The charge must be known before the proceedings commence. ... (Id., at 551).

Cole and Ruffalo were collectively followed in Gray v. Netherland, 518 U.S. 152, (1996). Earlier, in Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, (1974), the Court held that a defendant is entitled to know: "... the factual material on which the agency relies for decision so that he may rebut it, ..." Id., at 288, note 4. Thus, the constitutional requirement for notice of charges has been made applicable by this Court to administrative and quasi-judicial proceedings, such as the proceeding below.

Concurring in part and dissenting in part in Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985), Justice Brennan

noted: "The mere opportunity unsuccessfully to bring procedural violations to the attention of an appellate-type forum obviously does not constitute the meaningful 'chance to be heard' that is guaranteed by the Due Process Clause. Cole v. Arkansas, 333 U.S. 196, 201-202 (1948)." Id., at 673 note 21.

In his opinion concurring in part in In re Oliver, 333 U.S. 257 (1948), Justice Frankfurter stated: "... Due notice of the charge and a fair opportunity to meet it, are indispensable. ..." Id., at 284. Likewise: "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence." Id., at 273, opinion of the Court.

Because of the frequency with which code enforcement proceedings such as the instant scenario are appearing throughout the country, and the "relaxed" way in which charges are made and decided at such hearings, it is likely that the cost associated with trying to correct such situations would lead to similar denials of due process capable of repetition yet evading review. Such situations call for the Court to exercise its power by accepting this Petition.

There is no question that the Petitioners were "convicted" in a quasi-criminal procedure – with the

ultimate penalty of the likely loss of their real property – of a charge with which they were never charged or notified until they appeared at the last of several enforcement hearings prior to their ultimate conviction. The clearly established jurisprudence of this Court proscribes such a conviction, yet no decision of this Court deals with this specific question in this context. Accordingly, the instant Petition should be granted.

III. THE DUE PROCESS CLAUSE REQUIRES VARIANCE PROCEDURES TO PREVENT UNDUE HARDSHIP

A comprehensive "...plan is likened to a constitution for all future development within the governmental boundary." Machado v. Musgrove, 519 So.2d 629, 632 (Fla. 3d DCA 1987), citing O'Loane v. O'Rourke, 231 Cal.App.2d 774, 782, 42 Cal.Rptr. 283, 288 (1965). The governing Florida Statute defines a comprehensive plan as:

> (1) The comprehensive plan shall consist of materials in such descriptive form, written or graphic, as may be appropriate to the prescription of principles, guidelines, and standards for the orderly and balanced future economic,

> social, physical, environmental, and fiscal development of the area. § 163.3177 (1) F.S., 2009.

Notwithstanding the concept that a comprehensive plan should basically consist of goals, objectives and policies, some comprehensive plans, such as Citrus County's, contain unbending objective requirements. Included in these requirements in Citrus County, is the requirement that no building be built closer than 15 feet to the water's edge. [12] As set out in Part II of this Petition for Writ of Certiorari, Petitioners were "convicted" of violating this requirement even though it was not alleged in the charging instruments, nor raised in the code enforcement proceedings prior to Petitioners' final conviction.

However, this issue relates to the absence of a process to secure a variance from this objective standard. As both the Special Master and the Circuit Court noted, there is no process by which a variance from this numeric requirement can be obtained (Appendix C at 14a, Appendix E at 40a - 41a).

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[12] Citrus County Comprehensive Plan, Future Land Use Element, § 17-17.31.8, p. 10-184.

The absence of the ability to obtain a variance in these circumstances deprives Petitioners and all those similarly situated of the due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

This requirement of providing procedures to obtain variances, is extensively recognized in state courts throughout the country: "the purpose of a variance is to afford a safety valve," Crone v. Town of Brighton, 119 N.Y.S.2d 877 (N.Y. Int. App. 1952): "The true variance, ... is designed to preserve the constitutionality of the legislation," Reynolds v. Zoning Board of Review of Town of Lincoln, 191 A.2d 350 (R.I. 1963); "A variance is designed as an escape hatch," Lincourt v. Zoning Board of Review, City of Warwick, 201 A.2d 482 (R.I. 1964); a variance is "a necessary part of every zoning ordinance to prevent its constitutionality from being challenged," Bieger v. Village of Moreland Hills, 209 N.E.2d 218 (Oh. Int.App. 1965); a variance "is designed to provide relief from the strict letter of the regulations, protect zoning regulations from constitutional attack, alleviate an otherwise unjust invasion of property rights," Palmer v. Board of Zoning Adjustment, 287 A.2d 535 (D.C. App. 1972); the purpose of a variance is to prevent a zoning ordinance from being unconstitutionally confiscatory, Clerics of Saint Viator v. District of

Columbia Board of Zoning Adjustment, 320 A.2d 291 (D.C. App. 1974).

See also: Azalea Corporation v. City of Richmond, 112 S.E.2d 862 (Va. 1960); Kent County Land Company v. Zoning Board of Review of the City of Warwick, 216 A.2d 511 (R.I. 1966); Bouley v. City of Nashua, 205 A.2d 38 (N.H. 1964); Consolidated Management, Inc. v. City of Cleveland, 452 N.E.2d 1287 (Oh. 1983); National Land and Investment Company v. Kohn, 215 A.2d 597 (Pa. 1965); Greenawalt v. Zoning Board of Adjustment of the City of Davenport, 345 N.W.2d 537 (Iowa 1984); and Vinson v. Medley, 737 P.2d 932 (Ok. 1987).

At an early time in land use control law, this Court, itself, identified the need for a variance process. The year after this Court decided the seminal case approving zoning as a technique for the control of land use: Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court decided Gorieb v. Fox, 274 U.S. 603 (1927). In Gorieb, the Court held:

> ... The proviso evidently proceeds upon the consideration that an inflexible application of the ordinance may under some circumstances result in unnecessary hardship. In laying down a general rule, such as the one with which we are here

> concerned, the practical impossibility of anticipating and providing in specific terms for every exceptional case which may arise, is apparent. And yet the inclusion of such cases may well result in great and needless hardship, entirely disproportionate to the good which will result from a literal enforcement of the general rule. Hence the wisdom and necessity here of reserving the authority to determine whether, in specific cases of need, exceptions may be made without subverting the general purposes of the ordinance. We think it entirely plain that the reservation of authority in the present ordinance to deal in a special manner with such exceptional cases is unassailable upon constitutional grounds. Wilson v. Eureka City, 173 U.S. 32, 36-37; In re Flaherty, 105 Cal. 558, 562; Ex parte Fiske, 72 Cal. 125, 127. Id., at 607 [Emphasis Added]

Regardless of these authorities, communities all over the country have adopted land use controls that are devoid of the constitutionally mandated opportunity for a variance. The instant action provides the Court with an opportunity to prevent further loss of this long overlooked, yet valuable property right – to simply be able to secure a variance in the event of an unnecessary hardship.

The application of the 15 foot rule in the Citrus County Comprehensive Plan requires its inflexible application, here, and in many other potential cases, of an unnecessary hardship, a hardship which is disproportionate to the good that might result from the enforcement of the general rule.

Gorieb established a fundamental linchpin of land use controls – the need for the "safety valve" or "escape hatch" of a variance process. It is not a reach to call the Gorieb requirement for a variance process – announced the year after Euclid – the sine qua non of land use controls.

The absence of a process to obtain a variance from the numeric standards of the Citrus County Comprehensive Plan violates the due process requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States. It is time to reaffirm this essential and fundamental right.

CONCLUSION

While many issues come before this Court with great regularity, and the path taken is often motivated by enormous amounts in controversy, few code enforcement cases, and none in the last 43 years,

actually make the journey to this point. Obviously the time and expense needed to bring a relatively minor "code enforcement" issue before the Supreme Court of the United States explains this apparent infrequency.

Critically, however, the trend across the nation is to move toward quasi-judicial hearings such as that at issue in the instant action to serve as the forum in which fundamental property rights are adjudicated. This case provides this Court with an exceptional opportunity to establish a modern framework for such matters one that can ensure fairness in who hears the matters, fairness in what charges may be prosecuted, and fairness in eliminating the undue hardships invariably caused by the absence of variances processes in land uses controls.

The exercise of this Court's resources will stand in good stead: land owners, the public at large, local governments and the Courts will all benefit from this much needed guidance. The efficacy of this less formal process is evident by the small number of code enforcement issues that have made their way to the Federal Courts.

When this Court has dealt with issues arising from code enforcement proceedings, the Court has extended Constitutional protections of the Bill of

Rights to land owners. The Court has held that the Fourth Amendment requires the issuance of a warrant "to effect unconsented administrative entry and inspection of private commercial premises," See v. City of Seattle, 387 U.S. 541 (1967); and Camara v. Municipal Court, 385 U.S. 523, (1967) (applying the same principle to residential uses). The instant action presents an opportunity to ensure fairness, appropriate recognition of due process, and proper administration of such matters in the days to come.

Glaringly absent from the proceedings below is the due process mandated by the Fifth and Fourteenth Amendments to the Constitution of the United States. Petitioners were denied a fair and impartial adjudicator; they were "convicted" based on a charge not included in the charging instrument, and not raised until the final hearing before the Special Master, and the offense of which they stand convicted is a numeric provision of a land development control which lacks the constitutionally mandated variance process. With no guidance from the Court, such repugnant experiences will surely be repeated all over the country.

Petitioners respectfully submit that the foregoing reasons support the instant petition for writ

of certiorari. It is respectfully requested that the Court grant review in this matter.

Respectfully submitted,

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Clearwater, Florida 33764
Telephone (727) 536-2100
Facsimile (727) 536-2110
Counsel for Petitioners

APPENDICES

Appendix A-1

SEAL

Board of County Commissioners
Department of Public Safety
Code Enforcement Section
3600 W. Sovereign Path, Suite 292,
Lecanto, Florida 34461
352-527-7665

NOTICE OF VIOLATION

September 28, 2007

Citizen Complaint # 0701-007 Amended
BOCC # JV-07-47

John and Joanne Lawson
5590 South Boulevard Drive
Homosassa, FL 34448

On July 2, 2007, the following initial violation was observed on property located at: 5590 South Boulevard Drive, Homosassa, FL, legally described as: [LEGAL DESCRIPTION OMITTED]

Violation: Change of use of a portion of the above structure without required Level Two PDRB approval and permits & installation of a commercial fence requires a valid building permit, pursuant to Chapter 2, Sections 2020 Development Orders Required;" 2021"

Change of Use;" 2120 "'Planning and Development Board Action – Level Two;" & 2321 "building permits," Citrus County Land Development Regulations.

Effective action required: obtain Level Two PDRB approval for a bar and obtain an after-the-fact building permit for fence.

Time for correction: The above condition must be corrected and the property brought into compliance not later than October 31, 2007.

Should this violation continue beyond the time specified for correction, the Code Enforcement Section will request a PUBLIC HEARING before the Code Enforcement Board. If the violation is corrected and then recurs or if the violation is not corrected by the time specified for correction, the case may still be presented to the Code Enforcement Board even if the violation bas been corrected prior to the Board hearing. If this is a repeat violation, the Code Enforcement Board also retains the right to schedule a hearing to determine costs and impose the payment of reasonable enforcement fees even if the violation is corrected as required by the Enforcement Official.

Appendix A-1

The Code Enforcement Board has the power to issue orders having the force and effect of law; to order abatements and repairs; to establish and levy fines up to $250 per day for first offenses, up to $500 per day for repeat violations, and up to $5000 per violation for irreparable or irreversible violations. Fines and penalties imposed by this Board become interest accruing liens filed with the Clerk of Court.

If you transfer ownership of the aforementioned property prior to hearing, you must disclose this existence of this violation to the transferee and provide notice of the transfer to the Enforcement Official as required by Florida Statute section 162.06. Failure to do so creates a presumption of fraud in the transaction.

Thank you for your cooperation in correcting this violation,

/S/
Bill Harms
Code Inspector

SEAL

Board of County Commissioners
Department of Public Safety
Code Enforcement Section
3600 W. Sovereign Path, Suite 292,
Lecanto, Florida 34461
352-527-7665

Department of Public Safety,
Code Enforcement Section,
Petitioner,

vs.

Case # 0707-007
November 2, 2007

John and Joanne Lawson
5590 South Boulevard Drive
Homosassa, FL 34448
Respondents,

Administrative Complaint and Notice of Hearing.

COMES NOW, the Petitioner, the Department of Public Safety, and files this Administrative Complaint against John & Joanne Lawson, herein after referred to as Respondents. The undersigned Enforcement Official hereby gives notice to the Citrus

County Code Enforcement Board and the Respondents that an initial violation of the Citrus County Code of Ordinances or the Citrus County Land Development Code, as set forth herein, remains at the following address: 5590 S. Boulevard Drive, Homosassa, FL, as more particularly described below.

Petitioner further states that Respondents have failed to correct such violation as required by the Notice of Violation issued on September 28, 2007, and that this matter shall be presented to the Citrus County Code Enforcement Board on December 19, 2007 at 9:00 a.m. in Room # 166, Lecanto Government Center, 3600 W. Sovereign Path, Lecanto, Florida 34461. Important rights affecting your interest in this property will be adjudicated at this hearing. Legal Description: [OMITTED]

Violation: Change of use of a portion of the above structure without required Level Two PDRB approval and permits & installation of a commercial fence requires a valid building permit, pursuant to Chapter 2, Sections 2020 "Development Orders Required;" "2021 "Change of Use;" 2120 "Planning and Development Board Action Level Two;" & 2321 "building permits," Citrus County Land Development Code.

Appendix A-2

Violation first observed: September 28, 2007
To have been corrected by: October 31, 2007

/S/
William Harms
Enforcement Official

Note: If corrective action is taken and the aforementioned violation is abated as verified by the Enforcement Official, such official may request the Code Enforcement Board Secretary to withdraw this matter from consideration by the Board.

Appendix B

CODE ENFORCEMENT BOARD OF CITRUS COUNTY, FLORIDA

COUNTY OF CITRUS
Petitioner,
vs. CEB Case No. 0707-007

John & Joanne Lawson
5590 S. Boulevard Dr.
Homosassa Springs, [sic] FL 34448
Respondent(s).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS CAUSE came on for public hearing before the Board on December 19,2007, after due notice and the Board having heard testimony from the code inspector under oath and received evidence, thereupon issues its Findings of Fact, Conclusions of Law and Order, as follows:

I. FINDINGS OF FACT:
Change of use without Level Two PDRB approval and permits.

II. CONCLUSIONS OF LAW:

Citrus County Land Development Code or the Citrus County Code of Ordinances

III. ORDER:

Based upon the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, it is hereby ORDERED THAT:

The Respondent was found guilty and granted until Febr 11, 2008 to abate the violation. If the violation is not brought into compliance as ordered by the Board, a penalty of up to $250.00 per day may be imposed. This fine will be recorded and will constitute a lien on the real or personal property of John and Joanne Lawson.

DONE AND ORDERED this the 26th day of December 2007, at Lecanto, Florida.

CODE ENFORCEMENT BOARD
OF CITRUS COUNTY, FLORIDA

BY: /S/
William Winkel, Vice-Chairman

I HEREBY CERTIFY that a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS

OF LAW AND ORDER has been furnished via U.S. Certified Mail to John and Joanne Lawson, this the 8th day of ~~December, 2007~~ January, 2008

/S/

Recording Secretary.

Appendix C

CODE ENFORCEMENT SPECIAL MASTER OF CITRUS COUNTY, FLORIDA

COUNTY OF CITRUS
Petitioner,
vs.
JOHN & JOANNE LAWSON
5590 S. Boulevard Drive CE Case No. 0707-007
Homosassa, FL. 34446 [sic]
Respondents.
[Information showing recording in Citrus County Official Records omitted]

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS CAUSE came on for public hearing before Citrus County Code Enforcement Special Master Michelle Lieberman on November 19, 2008, after due notice and the Special Master having heard testimony from the Code Officer and other witnesses under oath and received evidence, thereupon issues her Findings of Fact, Conclusions of Law and Order, as follows:

I. FINDINGS OF FACT:

Appendix C

After an investigation by Code Officer William Harms, a notice of violation was issued to the Respondents alleging in [sic] violation of Citrus County Land Development Code Section 2020 "Development Orders Required"; 2021 "Change of Use"; 2120 "Planning and Development Review Board Action-Level Three"; 2321 "Building Permits" for change of use without Level Two PDRB approval and permits and installation of a commercial fence without a permit.

The Citrus County Code Enforcement Board, on December 19, 2007, found Respondents guilty, and ordered Respondents to abate the violations by February 11, 2008, or a fine of up to $250.00 per day could be imposed thereafter. Such matter, upon a modification of the Citrus County Code of Ordinances, was transferred to the Special Master. As of November 16, 2008, the maximum fine that could be imposed is $70,250, which sum reflects 281 days of violation from February 12, 2008 through November 18, 2008.

The change of use in this case occurred upon modification of a structure located on Respondents [sic] property, which structure was previously a freezer, to a restaurant and bar establishment. As testified to, this structure had been there for a significant period of time. To bring the structure into compliance,

Respondents must first have the proper zoning. Second, Respondents must permit the structure itself.

Pursuant to testimony set forth by Citrus County, the structure sits 8 feet from the water's edge. The Citrus County Comprehensive Plan, however, requires that all structures be a minimum of 15 feet from the water's edge. Respondents have applied for a Planned Development Overlay as part of the process to permit the structure itself. The County testified that such application was recommended for denial as it could not meet the requirements of the County's comprehensive plan. Testimony previously provided by the County at prior hearings had not revealed the information regarding the setback and recommended denial of the Planned Development Overlay application.

II. CONCLUSIONS OF LAW:

The Respondents have previously been found guilty and continue to be in violation of the Citrus County Land Development Code. One manner in which the Respondents may abate the violation is to receive a permit for the new use of the structure. To receive a permit, Respondents must first have the proper zoning. Currently, the proper zoning does not exist. While there are questions surrounding the current land use

designation as set forth in the Citrus County Comprehensive Plan, such issues are not dispositive of Respondents' ability to obtain a permit.

The questions surrounding the future land use designation are based upon the validity or invalidity of a 2006 ordinance amendment modifying Citrus County's Generalized Future Land Use Map, which map is part of the County's Comprehensive Plan. Invalidation of said ordinance, while impacting the designation of Respondents' land on the County's future land use map, does not similarly impact the other portions of the County's Comprehensive Plan, including those textual provisions requiring a minimum 15 foot setback from the water's edge for all structures.

In addition to having the proper zoning, Respondents must also properly permit the structure. While it is correct that the structure itself has been there for a considerable period of time at 8 feet from the water's edge, it existed as a freezer. Therefore, as a freezer, the structure was a nonconforming use. As a matter of law, a nonconforming use cannot be modified to a different use and maintain its status as a lawful nonconformity. As such, Respondents' new use of the structure must comply with the County's

Comprehensive Plan, including the 15 foot setback requirement. Moreover, as required by Chapter 163, Fla. Stats., the County may not issue any development order in violation of its Comprehensive Plan. One may not lawfully obtain a variance from the Comprehensive Plan.

Therefore, while Respondents may abate the violation by properly permitting the structure, it appears clear based upon the evidence and testimony now presented by the County that the structure cannot be permitted as it currently sits.

Moreover, merely closing the business cannot abate the violation. The violation did not occur upon the opening of the structure for business. Rather, the violation for which Respondents were cited occurred upon the modification of the structure itself, which modified the otherwise valid nonconforming use. As such, absent a textual amendment to the County's Comprehensive Plan, it appears only the restoration of the structure to its valid nonconforming state can abate the violation.

Although a fine of $70,250 may be imposed, the testimony has been, and continues to be, that Respondents have made a substantial effort to obtain permitting. However, based upon the testimony of the

County, such efforts now appear futile. As Respondents continue to be in violation of the Citrus County Land Development Code, and considering the factors set forth in Chapter 162, Fla. Stats., a fine for said violation is appropriate.

Citrus County v. Lawson
CE Case No. 0707-007

III. ORDER:

Based upon the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, it is hereby ORDERED THAT:

A fine of $25,000, reflecting the Respondents' ongoing violation from February 12, 2008 through November 18,2008, is imposed as a lien of record. Said lien shall not be filed in the public record until thirty days from the date of this order have passed. If Respondent fails to file an appeal during this time, the lien may be recorded. If an appeal is filed, the lien shall not be filed in the public record until such time as all appeals are exhausted and any order thereon is final.

The continuing fine shall be set, from November 19, 2008 forward, at $100 per day. The matter is

continued until February 18, 2009. Fines that have accrued as of that date may be imposed at that time if Respondents property remains in violation.

DONE AND ORDERED this the 9th day of December 2008, at Lecanto, Florida.

BY: */S/*
Michele Lieberman
Special Master

I HEREBY CERTIFY that a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER has been furnished via U.S. Certified Mail to John and Joanne Lawson, this the 16th day of December, 2008.

/S/
Recording Secretary

I HEREBY CERTIFY that as an Agent of the Citrus County Department of Development Services, the office, to whose custody the original Order is entrusted, this is a true and correct copy of the document maintained on file in the Code Enforcement records of Citrus County, Florida.

Appendix C

/S/

Recording Secretary
Citrus County Code Enforcement
Hearing for Citrus County
Department of Development
Services

3

Appendix D

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA

JOHN LAWSON and
JO ANNE LAWSON,
Appellants,

vs. CASE NUMBER: 2008-CA-007192
CE Case Number: 0707-007

CITRUS COUNTY, a political
subdivision of the State of Florida,
Appellee.
_____/

ORDER ON APPELLANTS' MOTION TO ABATE APPEAL AND FINAL ORDER ON APPELLANTS' REQUEST FOR ORAL ARGUMENT

THIS CAUSE came before the Court upon the Appellants' Motion to Abate Appeal and Remand with Instructions, and the Appellants' previous Request for Oral Argument. And the Court having reviewed the record and being otherwise fully advised of the premises, finds as follows:

Appendix D

1. The Appellants state that the Code Enforcement Special Master is barred by statute from serving as the Special Master and request to abate this appeal with instructions to remand the matter to a fair and impartial Code Enforcement Board for new proceedings. The Court will not abate the appeal. However, as the Appellants have pointed out in their motion, due process issues that are not apparent in the record may be raised for the first time on appeal. Sparks v. State, 740 So.2d 33 (Fla. 1st DCA 1999). A review of the Appellants' Reply Brief reveals that the Appellants have raised the issue and the matter will be given due consideration in these proceedings.

2. In a previous Order, this Court reserved ruling on the Request for Oral Arguments until a later date. At this point, no further briefs are permitted. Accordingly, the Appellants' Request for Oral Argument is granted. Each side will strictly adhere to the 20 minutes time limit for arguments. See Fla.R.App.P. 9.320. Accordingly, the Plaintiff and Defendant will coordinate with Judge's Judicial Assistant to schedule a hearing for Oral Arguments in this matter.

Based on the foregoing, it is thereupon;

ORDERED AND ADJUDGED:

1. That the Appellants' Motion to Abate Appeal and Remand with Instructions is DENIED.

2. That this Appellants' [sic] Request for Oral Argument is GRANTED. The parties will proceed as directed above.

DONE AND ORDERED in Chambers in Inverness, Citrus County, Florida this 11th day of May, 2009.

/s/
PATRICIA V. THOMAS
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by United States Mail, first class postage pre-paid, in hand delivery, or by courthouse mailbox to the following this 11th day of May, 2009.

[x] Luke Lirot, Esq. and Bryan R. Snyder, Esq., Luke Charles Lirot, P.A., 2240 Belleair Road, Suite 190, Clearwater, FL 33764

[x] Citrus County Attorney, Attn: Robert Battista, via courthouse mail.

Appendix D

/s/

Kathy Rector Judicial Assistant

Appendix E

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA

JOHN LAWSON and
JO ANNE LAWSON,
Appellants,

vs. CASE NUMBER: 2008-CA-007192
CE Case Number: 0707-007

CITRUS COUNTY, a political
subdivision of the State of Florida,
Appellee.
_____/

FINAL ORDER

John Lawson and Jo Anne Lawson appeal an Order of the Code Enforcement Special Master of Citrus County which determined that the Appellants were in violation of the Citrus County Land Development Code and imposed a fine. This Court has appellate jurisdiction pursuant to section 162.11, Florida Statutes (2008) and Florida Rule of Appellate Procedure 9.030(c)(1)(C). This Court, having reviewed the Appellants' Initial Brief, the Appellee's Answer Brief, the Appellants' Reply, having held Oral

Arguments on July 13,2009, and having reviewed the record and being otherwise fully informed of the premises, affirms the Order of the Special Master.

A. Facts and Background

1. John and Jo Anne Lawson, the "Appellants," are the current owners of the Cedar Key Fish & Crab Company ("Cedar Key Fish House"). The property has been utilized commercially as a fish house for many years and received "vested rights" for continued use as a wholesale/retail seafood business in 1976.

2. A 1986 zoning ordinance designated the property "CF" for Commercial Fishery. Upon initial adoption of the Land Development Code ("LDC") Atlas in 1990, the property was given the Coastal Lakes Residential ("CLR") designation. Both the "vested rights" and the valid non-conforming use recognition (as a result of the CLR designation) remain in effect.

3. For numerous stated reasons, the property was re-designated from CLR to Coastal Lakes Commercial ("CLC") on the Comprehensive Plan, Generalized Future Land Use Map ("GFLUM").[1] This

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[1] These reasons include that the change was requested by the owners of the property in recognition of its long established commercial use and prior "vested rights." County Staff approved of the change request to be consistent with the "Old

Comprehensive Plan Amendment, CPA-06-16, was adopted pursuant to Citrus County Ordinance 2006-A 16 on October 24, 2006. Thereafter, County Staff planned to update the LDC via Atlas Amendment (AA-07-02) to be consistent with the Comprehensive Plan (GFLUM element), but the application was later withdrawn at the direction of the Board of County Commissioners.

4. On February 6, 2007, the Appellants were granted a "2 COP" (consumption on premises) Alcoholic Beverage License by the Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco. A copy of the application included in the Appendix reveals that the Appellants checked the boxes on the forms for a "new license" with a designation as SSF (Stand-alone bar with Food). See Appendix II, #27. Correspondence from the County's Director of Development Services reveals that the County believed it was only a license

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Homosassa Plan," which would protect the historic nature of the remaining "fish houses." Additionally, the Department of Community Affairs ("DCA") encouraged updating the GFLUM down to the parcel level (below a ten acre threshold) during the EAR process. But see Debes v. City of Key West, 690 So. 2d 700, (Fla. 3d DCA 1997) (explaining impermissible spot zoning, spot planning in reverse, or specific-use oriented zoning).

renewal with review for compliance with the LDC section 4667.E.1, which allows the sale of wine and beer within a structure whose principle use is for the sale of groceries. See Appendix II, #26.

5. Due to numerous complaints in July of 2007, County officials started an investigation into alleged building code and public safety violations at the Cedar Key Fish House property. County Public Safety inspectors noted several fire and life safety violations.[2] Specific to this appeal, County Building Code Inspectors identified four violations of construction without a permit: installation of a fence, construction of a chickee,[3] replacement of a garage door, and the apparent operation of a tavern. The Appellants were formally notified of these violations on September 28, 2007. The Notice of Violation expired on October 31, 2007, without full resolution and the case proceeded to the Code Enforcement Board.

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[2] The record indicates that the Appellants eventually corrected all fire and life safety discrepancies. These public safety issues are not the subject of this appeal.

[3] "Chickees" are defined in section 553.73(9)(I), Florida Statutes. They must be built by the Miccosukee or Seminole Indian Tribes and are exempt from some requirements of the Florida Building Code.

6. After the notice of hearing was issued on November 2,2007, a public hearing was held on December 19, 2007, before the Citrus County Code Enforcement Board. The Board found the Appellants guilty of "change of use without a Level Two PDRB approval and permits." The Appellants were given until February 11, 2008, to abate the violations or face potential fines.

7. A hearing was held again on March 19, 2008. By this time, the County had adopted an alternative code enforcement system by changing code enforcement proceedings from a Board to a Special Master. At the March 19th hearing, the Code Enforcement Special Master noted that the Appellants were making good faith efforts to comply with the LDC and continued the matter until June of 2008.

8. In an effort to comply with the various code violations, the Appellants applied in March of 2008 for an Atlas Amendment to the LDC (AA-08-16) to designate the property as CLC [4] with a Planned Development Overlay (PDO-08-02) to address the

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[4] Changing the LDC designation for the property from CLR to CLC would address the fence violation. The Appellants were able to address the garage door replacement violation with an after-the-fact permit.

addition of a chickee and the change of use to a bar/tavern.

9. The matter was continued again on June 18, 2008, and again on August 20, 2008, until November after the Planning Development Review Board ("PDRB") held its hearing on AA-0816 and PDO-08-02.

10. On October 2, 2008, the PDRB attempted to hold a public hearing on AA-08-16 and PDO-08-02. However, too many members of the public attended the hearing, so the meeting was postponed until a larger public forum could be arranged. The public hearing was eventually held on November 18, 2008, where in yet another turn of events, the County Attorney advised that it was his opinion that the 2006 Comprehensive Plan Amendment CPA-06-16, which changed the Cedar Key Fish House's designation from CLR to CLC on the GFLUM, was inadequately advertised and therefore void. Members of the PDRB reasoned that moving forward on the Atlas Amendment and the PDO would be futile until the legal issue was resolved. As a result, the PDRB did not review AA-08-16 or the PDO-08-02.

11. On November 19, 2008, another hearing was held by the Code Enforcement Board Special Master. On December 9, 2008, the Special Master issued the Amended Findings of Fact and Conclusions of Law and Order which reviewed the violations and

the past finding of guilt. [5] The Order found that the structure had been modified to a restaurant and bar establishment, but to be in compliance, the Lawsons would have to obtain the proper zoning and obtain a permit for the structure. The Special Master remarked that the County provided new testimony that the structure sits 8 feet from the water's edge, but the Comprehensive Plan requires a minimum of a 15 foot setback. The Order noted that staff recommended denial of the pending PDO application because a development order could not be approved to change the structure's use (to a bar/tavern) in violation of the Comprehensive Plan's setback requirement. The Special Master commented that the opined invalidity of the 2006 GFLUM amendment may impact the property's designation on the GFLUM, but it does not affect the textual portions of the Comprehensive Plan that established the setback requirement. The Special Master reiterated that although the Cedar Key Fish House previously existed as a non-conforming use, any change of use must comply with the Comprehensive Plan. The Order concluded that "absent a textual amendment to the County's Comprehensive Plan, it appears only the restoration of the structure to its

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[5] The Building Code Inspector's Notice of Violation found the Appellants in violation of sections 2020, 2021, 2120, and 2321 of the LDC.

valid nonconforming state can abate the violation." As a result, the Special Master imposed a $25,000.00 fine and a continuing fine of $100.00 per day if the property remained in violation. It is this Order which the Appellants appeal.

B. Appellants' Initial Brief—Summary

The Appellants appeal the Amended Findings of Fact and Conclusions of Law and Order, which found the Appellants in violation of the LDC and imposed fines. The Appellant's Initial Brief set forth arguments, summarized as follows:

1. The maintenance of the code enforcement action, and any fines issued thereon, should be rendered void by the doctrine of equitable estoppel.

> The Appellants argue that because they relied in good faith on the County's approval of the 2COP zoning approval, they went through the effort of obtaining a state beverage license and made substantial changes in their position by incurring extensive obligations and expenses. Additionally, they argue that based on fairness and rewarding parties for their industry, it would be highly

> inequitable and unjust to destroy the rights the Appellants have acquired.

2. The code enforcement proceedings operated as a denial of the Lawsons' due process rights.

> Due process was denied by "prejudging the request for the PDO based solely on the recommendation of 'denial' by staff, before any determination was made by the PDRB." The AA and PDO applications were consistent with the Comprehensive Plan.

3. The imposition of the code enforcement fine was not supported by competent and substantial evidence.

> No evidence was presented to invalidate the 2COP wet zoning issued or to undermine the legitimacy of the PDO or AA and no actual determination was made by the PDRB when the code enforcement fines were imposed.

4. That the Lawsons' applications should have been viewed in a positive context during all code enforcement proceedings based on the fact that the applications were consistent with the Comprehensive Plan.

> Here, the Appellants argue that based on the historically commercial nature of the

> property, the vested lights determination, the current use of the property, and the doctrine of equitable estoppel, the use of the property is consistent with the Comprehensive Plan and it was improper to impose fines based on mere speculation that the applications would not be granted.

C. Appellee's Answer Brief—Summary

The Appellee's Answer Brief reviews the case history and the Amended Findings of Fact and Conclusions of Law and Order and makes the following arguments:

1. The Proper standard of review is not a de novo review, but rather, is limited to a review of the record before the Special Master.

2. The Appellants received adequate due process with notice and opportunity to be heard and failed to demonstrate an error upon which the Special Master's Order should be reversed.

3. The Appellants were previously found in violation of the LDC; therefore, the Special Master was authorized to impose the fine.

5. [sic] The Appellants' land use applications proceedings have no bearing on the issue of LDC

violations and whether the Special Master properly issued fines.

> The Appellee stresses that the Code Enforcement Master does not have jurisdiction over land use applications. The applications were only tangentially related to the code enforcement proceedings in that the Appellants were attempting to change the land use designation so that they could get permits and come into compliance with the LDC to avoid the Special Master's fines. Those application processes had nothing to do with whether the Special Master had the authority to impose fines or whether the decision was based on evidence.

D. Appellant's Reply Brief—Summary

In the Reply Brief, the Appellant concurred that the standard of review is an on-the-record review and not a de novo proceeding. They attached the transcript from the November 19, 2009, hearing before the Code Enforcement Special Master. The Appellants' arguments in Reply are outlined as follows:

1. The Evidence in transcript [sic] supports the application of the doctrine of equitable estoppel for the benefit of appellants.

> The Appellants point out that the transcript shows that they developed the equitable estoppel argument before the Special Master, reiterate that they relied upon the County's issuance of a 2 COP alcoholic beverage license to their detriment and add that the County's attempt to amend the GFLUM to change the properties designation back to CLC in 2006 was another act upon which the Appellants relied to their detriment.

2. The Record in this action reveals multiple denials of due process.

> The Appellants acknowledge that they were afforded adequate procedural due process, but set forth an argument that the Special Master had a conflict of interest that amounted to a denial of due process by acting as the Special Master at the same time as she represented the County on various appellate matters. Additionally, the Appellants suggest that it is a denial of due process to affirm the Special Master's Order while there is

confusion regarding the validity or invalidity of the 2006 Comprehensive Plan Amendment CPA-06-16. And finally, the Appellants disagree with the Special Master's legal conclusion. The Appellants cite numerous cases for the proposition that denying a variance can be unconstitutional.

3. The Appeal of the Final Order fully protects the Appellant's rights and no earlier appeal was necessary.

4. The land use changes are material to this code enforcement appeal.

E. The Oral Argument

1. At Oral Arguments, the Appellants started by contending that their due process rights were violated because of the Special Magistrates conflict of interest. Additionally, the Appellants reiterated their estoppel argument based upon the County's approval of the beverage license, the County's ill-fated 2006 attempt to change the zoning to commercial, and their good-faith attempts to comply with the comprehensive plan. Further, the Appellants argued that all of the delays were not their fault and that it was a denial of

due process for the Special Master to change her mind based upon the staff recommendations to the PDRB.

2. The Appellee argued that the Appellants waived their right to object to the Special Master and that the Special Master did not violated [sic] the statute prohibiting dual representation. The Appellee asserted that the standard of review was of the record before the Special Master, not the public records included in the appendix. Further, that all due process requirements for the hearings were met, and that the Special Master relied on the competent substantial evidence presented by the testimony of the Code Enforcement Officer, the Code Enforcement Manager, Dr. Pitts (a Senior Planner), and the Director of Development Services.

F. Standard of Review

1. The Appellants appeal the final administrative order of the Code Enforcement Special Master pursuant to Section 162.11, Florida Statutes (2008) ("An aggrieved party ... may appeal a final administrative order of an enforcement board to the circuit court."). Local Rules permit a single circuit judge to sit in an appellate capacity to review agency actions. See Circuit-wide Admin. Order 87-23. "Such an appeal shall not be a hearing de novo but shall be

limited to appellate review of the record created before the enforcement board." § 162.11, Fla. Stat. Although the plain language of the statute clearly indicates "appellate review" rather than "certiorari review," the circuit court's standard of review is essentially the same. See Victoria L. Cecil, The Appealing Nature of Local Code Enforcement Board Decisions, 82-MAY Fla. B.J. 42,44 (2008) (noting that the standard of review was the same, but there are substantial procedural differences between the two remedies). Accordingly, the standard of review for this appeal is best outlined by the Supreme Court of Florida as follows: "Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence." City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982).

2. "The Supreme Court of Florida has defined substantial evidence as 'such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred.'" Marion County v. Priest, 786 So.2d 623, 625 (Fla. 5th DCA 2001) (citing De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957). "For the 'substantial' evidence to also constitute 'competent'

evidence, the evidence relied upon 'should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.'" Id. (internal citation omitted). Moreover, a circuit court may not reweigh the evidence or substitute its evaluation of the evidence for that of the Code Enforcement Special Master. See Id. at 625; see also Florida Power & Light Co. v. City of Dania, 761 So.2d 1089 (Fla. 2000) (improper for circuit court to conduct a de novo review and substitute its judgment for city's as to relative weight of conflicting evidence).

G. Analysis

1. Whether procedural due process is accorded.

The Appellants concede that they received adequate notice and opportunity to be heard throughout the proceedings. However, the Appellants also argue that the prejudging of the PDO based solely on the recommendation of "denial" by staff, the alleged conflict of interest of the Special Master, the confusion regarding the validity or invalidity of CPA-06-16, and the claim of incorrect legal conclusions by the Special Master, were a denial of due process. Most of these claims are not due process claims, but rather, they

relate to whether the essential requirements of the law have been observed. However, the alleged conflict of interest of the Special Master should be addressed as a due process argument.

To support the claim that the Special Master had a conflict of interest, the Appellants primarily rely on section 162.05(5), which states that "[t]he local governing body attorney shall either be counsel to an enforcement board or shall represent the municipality or county by presenting cases before the enforcement board, but in no case shall the local governing body attorney serve in both capacities. § 162.05(5), Fla. Stat. (2008)

The Appellants argue that the Special Master violated this statute by serving as the Code Enforcement Special Master at the same time as representing the County in certain appellate cases before the Fifth DCA. However, cases before the Fifth DCA are not matters before the enforcement board. Thus, the Special Master did not violate section 162.05.

Additionally, the Appellants cite lofty case law regarding the "appearance of impropriety." Bammac, Inc., v. Grady, 500 So. 2d 274 (Fla. 1st DCA 1986) ("Equally as important to the administration of justice as actual due process and fairness is the appearance of propriety."). There are strict due process requirements as to the neutrality of officials performing judicial or

quasi-judicial functions. Tumey v. Ohio, 273 U.S. 510 (U.S. 1927). Here, the Appellants suggests that the Special Magistrate is "institutionally conflicted" or may be motivated to reach certain conclusions in the County's favor. However, the Appellants' argument is mere speculation without any evidence to show that the Special Master has a direct, personal, or substantial pecuniary interest in reaching a particular conclusion. See Id. at 523.

In sum, the Appellants' have received adequate notice and opportunity to be heard. The Special Master did not violate the statutory prohibition of section 162.05(5), and there is no evidence that the Special Master was "institutionally conflicted." Therefore, proper procedural due process was afforded to the Appellants.

2. Whether the essential requirements of the law have been observed.

The Appellants' argument is that the Special Master "pre-judged the request for the PDO based solely on the recommendation of 'denial' by staff, before any determination was made by the PDRB" and then concluded that "absent a textual amendment to the County's Comprehensive Plan, it appears only the restoration of the structure to its valid nonconforming

state can abate the violation." Further, the Appellants disagree with the Special Master's statement that "[o]ne may not lawfully obtain a variance from the comprehensive plan."

The Special Master is correct that a development order approved by a governmental entity must be consistent with the comprehensive plan or each element or portion as adopted. § 163.3194(1)(a), Fla. Stat. (2008). The setback requirement for structures near river surface waters is 50 feet, which includes an "undisturbed" buffer within 15 feet of the high water mark. See § 4120 LDC, Citrus County. Thus, the Appellants could never present a prima facia [sic] case that the requested use of their land was consistent with the County's Comprehensive Plan as would be their burden. See Davis v. St. Joe Paper Co., 652 So.2d 907, 910 (Fla. 1st DCA 1995) (noting the extremely difficult burden placed on a party seeking to vary the use of property from that permitted by a comprehensive plan); see also City of Jacksonville v. Wynn, 650 So. 2d 182 (Fla. 1st DCA 1995); Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987), review denied, 529 So.2d 694 (Fla 1988); City of Cape Canaveral v. Mosher, 467 So. 2d 468 (Fla. 5th DCA 1985).

Therefore, the Code Enforcement Special Master's conclusion that "[o]ne may not lawfully obtain

a variance from the comprehensive plan" and "absent a textual amendment to the County's Comprehensive Plan, it appears only the restoration of the structure to its valid nonconforming state can abate the violation," did not depart from the essential requirements of the law.

At the heart of the Appellants' defense is their estoppel argument. The Appellants argue that they relied to their detriment upon the County's issuance of a 2 COP alcoholic beverage license. Additionally, they argue that they relied to their detriment on the County's attempt to amend the GFLUM to change the property's designation to CLC in 2006. The law regarding estoppel claims against the government was recently explained by the First DCA as follows:

> Equitable estoppel is appropriate where the proof shows "(1) a property owner's good faith reliance (2) on some act or omission of the government and (3) a substantial change in position or the incurring of excessive obligations and expenses so that it would be highly inequitable and unjust to destroy the right he acquired." Equity Res. Inc. v. County of Leon, 643 So.2d 1112, 1117 (Fla. 1st DCA 1994) (quoting Franklin County v. Leisure Props., Ltd., 430 So.2d

475, 479 (Fla. 1st DCA 1983)). In a land use context, we said:

> One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances or commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds. ...

Id. at 1120 (quoting Town of Largo v. Imperial Homes Corp., 309 So.2d 571, 573 (Fla. 2d DCA 1975)). Thus a necessary precondition for equitable estoppel against the government is a governmental act or omission that invites a citizen "onto a welcome mat"

City of Jacksonville v. Coffield, WL 886214, *5-6 (Fla. 1st DCA 2009).

In review, the question is whether the County's act of approving the "2 COP" Beverage License and attempting to change the properties land use

designation on the GFLUM from CLR to CLC invited the Appellants "onto the welcome mat" of expending resources to change their commercial fishery into a bar/tavern. In this case, the County did not issue a Beverage License. The State Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco issued the Beverage License. Citrus County only reviews the application for compliance with section 4667. E. 1 of the LDC. The County's attempt to change the land use designation from CLR to CLC was in recognition of Cedar Key Fish House's long established "vested rights" to operate as a Commercial Fishery and to be consistent with the "Old Homosassa Plan." These reasons do not convey permission to change the commercial fishery into a bar/tavern or establish "vested rights" to develop the property to another use. City of Fort Lauderdale v. Dept. of Veteran and Community Affairs, 424 So.2d 102, 103 (Fla. 1st DCA 1982) (stating that the mere act of rezoning does not constitute such an authorization to develop as it has long been held that property owners do not have a vested right in zoning ordinances.) Thus, the County has not invited the Appellants "onto the welcome mat" of expending resources to change their commercial fishery into a bar/tavern; therefore, the Appellants argument for estoppel is without merit.

Accordingly, the Code Enforcement Special Master's conclusions of law did not depart from the essential requirements of law.

3. Whether the administrative findings and judgment are supported by competent substantial evidence.

The Code Enforcement Special Master's Amended Findings of Fact and Conclusions of Law and Order reveals that she relied on the Code Inspector's Notice of Violation, the Code Enforcement Board's finding of guilt in December of 2007, and the testimony of County Staff that the structure sits 8 feet from the water's edge in violation of the Comprehensive Plan's setback requirements.

A review of the Transcript of the hearing on November 19, 2008, indicates that the Code Inspector testified that he filed an affidavit of non-compliance that the structure was still in violation for change of use and installation of a commercial wood fence without the Level Two PDRB approval. Additionally, Dr. Pitts from Community Development Division explained the problems regarding the validity or invalidity of CPA-06-16 and explained that the "chickee" portion of the structure was constructed

within the 15 foot undisturbed buffer required by the LDC.

After Dr. Pitts' testimony, the Appellants developed their theory of estoppel. However, the Appellants clearly confused zoning matters with code violations by arguing that no one was sure whether the 1990 or the 2006 version of the Comprehensive Plan was in effect and that the Special Master could not impose fines until the Parties were sure which version of the Comprehensive Plan the Appellants must comply. Thereafter, the Special Master heard testimony from members of the public who all generally supported the operation as a tavern/bar. After the members of the public spoke, the Special Master reviewed her findings, stated her conclusions, and imposed the fines as set forth in her written Order.

The testimony of Mr. Harms, the Code Inspector, and his affidavit of non-compliance, the testimony of Dr. Pitts regarding the setback requirements and the actual location of the structure, the testimony of Mr. Maidhof, the Director of Development Services, regarding the permit process, as well as the previous findings of the Code Enforcement Board, established a substantial basis from which the fact at issue could be reasonably inferred and was sufficiently relevant and material that a reasonable mind could accept as adequate to support the conclusion reached. Thus, the

administrative findings and judgment of the Special Master are supported by competent substantial evidence.

G. Conclusion

The Code Enforcement process employed by the County in this case accorded proper procedural due process, and the Code Enforcement Special Master's Amended Findings of Fact and Conclusions of Law and Order observed the essential requirements of the law and was supported by competent substantial evidence. Therefore, the Special Master's Order is affirmed.

It is so ordered.

DONE AND ORDERED in Chambers in Inverness, Citrus County, Florida this 4th day of Aug, 2009.

/s/
PATRICIA V. THOMAS
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by United States Mail, first class postage pre-paid, in hand

delivery, or by courthouse mailbox to the following this 4th day of August, 2009.

[x] Luke Lirot, Esq. and Bryan R. Snyder, Esq., Luke Charles Lirot, P.A., 2240 Belleair Road, Suite 190, Clearwater, FL 33764

[x] Citrus County Attorney, Attn: Robert Battista, via courthouse mail.

/s/

Kathy Rector Judicial Assistant

Appendix F

IN THE DISTRICT COURT OF APPEAL OF
FLORIDA
FIFTH DISTRICT

JOHN LAWSON AND JO ANNE
LAWSON,

Petitioner,

v. CASE NO. 5D09-3136

CITRUS COUNTY,

Respondent.
_____/

DATE: January 19, 2010

BY ORDER OF THE COURT

ORDERED that Petitioner's Motion to Accept Filing Out of Time, filed November 6, 2009, is granted. Further it is

ORDERED that the Petition for Writ of Certiorari, filed January 8, 2010, is denied.

Accordingly, Petitioner's Request for Oral Argument is moot.

I hereby certify that the foregoing
is (a true copy) of the original
Court order.
/S/ SEAL
SUSAN WRIGHT, CLERK

cc. Luke Lirot, Esq.
Gregg R. Brennan, Esq.

Appendix G

IN THE DISTRICT COURT OF APPEAL OF
FLORIDA
FIFTH DISTRICT

JOHN LAWSON AND JO ANNE
LAWSON,

Petitioner,

v. CASE NO. 5D09-3136

CITRUS COUNTY,

_____ /

Respondent.

DATE: February 25, 2010

BY ORDER OF THE COURT

ORDERED that Petitioner's Motion for Rehearing, Motion for Rehearing En Banc alternative Request for Issuance of Written Opinion and Memorandum of Law, filed February 3, 2010, is denied.

I hereby certify that the foregoing
is (a true copy) of the original

Court order.

/S/ SEAL

SUSAN WRIGHT, CLERK

cc. Luke Lirot, Esq.
Gregg R. Brennan, Esq.

CITRUS COUNTY
LIEBERMAN AS ATTORNEY FOR COUNTY
INVOICES

Date,	Inv No.,	Matter,	Amount,	PDF Pages
10/31/07		Riverside,	$150.00	35
11/30/07		Riverside (1)	$2,332.25	33 - 34
12/31/07		Riverside	$241.05	32
01/31/08		Riverside	$203.15	31
04/30/08		Halls River	$10,198.53	26 - 30
04/30/08		Riverside	$75.35	21
06/30/08		Riverside	$1,370.71	24 - 25
06/30/08		?	$385.00	23
06/30/08		Halls River	$385.00	22
08/19/08	50	Halls River	$787.47	19 - 20
09/10/08	68	Halls River	$1,725.75	17 - 18
10/06/08	74	Halls River	$500.38	16
11/10/08	91	Riverside	$250.00	14 - 15
12/10/08	113	Halls River	$15.00	13
12/10/08	112	Riverside	$107.40	11 - 12
02/02/09	194	Halls River	$2,239.40	9 - 10
03/09/09	228	Riverside	$240.00	8
04/03/09	279	Halls River	$90.00	7
04/03/09	277	Riverside	$2,345.71	5 -6

05/05/09	284	Halls River	$1,836.92	3 - 4
05/05/09	296	Riverside	$260.30	1 - 2
		TOTAL	$25,739.37	

(1) May have included copies for a second case

CODE ENFORCEMENT SPECIAL MASTER
CITRUS COUNTY, FLORIDA

CITRUS COUNTY,
Petitioner

v.
JOHN & JoANNE LAWSON
5590 S. Boulevard Dr.
Homosassa, FL. 34446
Respondents.
_____/

CEH Case No. 0707-007
5590 S. Boulevard Dr.
Homosassa, FL.

AFFIDAVIT OF THOMAS H. WILLIFORD, AIA
IN SUPPORT OF
MOTION FOR STAY PENDING REVIEW

STATE OF FLORIDA)
COUNTY OF CITRUS)

BEFORE ME, the undersigned authority, personally appeared Thomas H. Williford, AIA, of the community of Holder, Citrus County, Florida, this 14

day of September, 2009, who, after being duly deposed and sworn, states as follows:

1. My full name is Thomas H. Williford, AIA, and I have full personal knowledge of the matters addressed herein.

2. I am over eighteen (18) years old, and I reside in Citrus County, Florida.

3. I am in practice as a licensed architect in the State of Florida, practicing in Citrus County.

4. I have served as architect for Respondents herein, and have attended at Appellants' business, Cedar Key Fish & Crab of Homosassa on various occasions.

5. I was present at Cedar Key Fish on Wednesday, September 2, 2009 for an inspection conducted by eight staff members of the Citrus County government.

6. I attended again at Cedar Key Fish on September 13, 2009 for the purpose of taking the measurement described in ¶ 16, infra.

7. My current resume is attached as Exhibit A to this my Affidavit.

8. Based on the foregoing, I am competent to testify as to the facts set out herein and to offer the expert opinions set out herein and would be competent to testify as to such facts and opinions if called to do so at trial.

9. The inspection of Citrus County described in ¶ 5, supra, was announced in a letter from Peter Aare, Senior Assistant County Attorney, to Luke Lirot, Esq., dated August 31, 2009. A copy of said letter is attached as Exhibit B to this Affidavit.

10. According to Mr. Aare's letter, the purpose of the inspection of Cedar Key Fish was:

> ... that the Citrus County Building Division, Fire & Rescue Department, and Code Compliance Division intend to conduct inspections of the premises located at 5590 S. Boulevard Drive, Homosassa, Florida, commonly known as Cedar Key Fish & Crab of Homosassa, the "Fish House," and the "Freezer," to include all of the grounds and all buildings, structures, and facilities thereon. The inspection will be for the purpose of investigating violations of the Florida Building Code, Florida Fire Prevention Code and, [sic] Life Safety Code; the Citrus County Code of Ordinances, and the Citrus County Land Development Code.

11. The inspection was attended by eight County officials:

> Senior Assistant County Attorney Peter Aarc
> Eber Brown Deputy Assistant County Administrator
> Kenneth Clammer, Assistant Fire Chief
> Michael Brennan, Fire Inspector
> Mr. Knowls from Code Enforcement
> Edward Bertoli, Building Inspection Supervisor,

Jim Baird, Assistant Building Division Director
John Ruppert, Construction Inspector, Building Division

12. No formal results from said inspection have yet been received, more than one week later.

13. In participating in the inspection with County staff, they and I observed several minor issues that require remediation to achieve full compliance with the codes cited in Mr. Aare's letter.

14. However, neither County staff nor I observed any code violations anywhere on Appellants' property that have the potential to endanger the public health, safety and welfare.

15. On September 13, 2009, I returned to Cedar Key Fish to measure the distance between the Tiki hut and the water to determine compliance with

Policy 17.31.8 of the Future Land Use Element of the Citrus County Comprehensive Plan.

16. At the point closest to the water, the Tiki hut is 15 feet 3 inches away from the water.

17. I have given the facts set forth in this Affidavit voluntarily, recognizing that it is to be used in submission in an administrative proceeding or in a court of law and under oath.

18. I have given this statement freely and voluntarily.

FURTHER AFFIANT SAYETH NAUGHT

/S/
THOMAS H. WILLIFORD STAMP

STATE OF FLORIDA
COUNTY OF Alachua

The foregoing instrument was acknowledged before me this 14 day of September, 2009, by Thomas H. Williford, who is personally known to me or who has

produced a Fl. Driver License as identification and who did take an oath.

/S/
Notary Public

My Commission Expires: Feb. 7, 2013

Respectfully submitted

/S/
Luke Lirot, Esquire
(email: luke2@lirotlaw.com)
Florida Bar Number 714836
Bryan R. Snyder, Esquire
(email: bryan@lirotlaw.com)
Florida Bar Number 042340
Luke Charles Lirot, P.A.
2240 Belleair Road, Suite 190
Clearwater, FL 33764
Telephone (727) 536-2100
Facsimile (727) 536-2110
Attorneys for the Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing via U.S. mail to Gregg R. Brennan, Esq., Assistant County Attorney, 110 North Apopka Avenue, Inverness, Florida, 34450, Ms.

Kimberly Corbin, Director, Code Compliance Division, 3600 West Sovereign Path Lecanto, Florida, 34461, and Michele Lieberman, Esq., 2805 Highway 44 West, Inverness, Florida, 34453, on this 14th day of September, 2009.

/S/
Luke Lirot, Esquire

[EXHIBITS OMITTED]

SUPREME COURT, U.S.
FILED
JUN 17 2010
OFFICE OF THE CLERK

No. 09-1436

In The Supreme Court of the United States

JOHN LAWSON, ET UX.,

Petitioners,

v.

CITRUS COUNTY, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fifth District

BRIEF IN OPPOSITION OF RESPONDENT CITRUS COUNTY

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Counsel of Record

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STATEMENT OF THE CASE

The statement in the petition does not accurately reflect the sole underlying issue in this particular case: During the hearing on November 19, 2008, did the Citrus County Code Enforcement Special Master Michele Lieberman afford the Petitioners procedural due process, observe the essential requirements of the law, and establish that she had competent substantial evidence upon which to reaffirm the Petitioners' violation of Citrus County Land Development Code section 2021[1] and issue the fine pursuant to the dictates of Florida Statutes Chapter 162? The statement also fails to detail that the questions presented in the petition were never presented to the state courts as questions of Federal Constitutional law and the state courts had adequate state law grounds upon which to issue their rulings and hence this matter is not properly before this Court.

The Petitioners' claims of violations of the United States Constitution by Ms. Lieberman and the Respondent were never brought forward during the

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[1] 2021. Change of Use

> Applications for Development Orders for change of use shall be filed with the Director of the Department of Development Services or designee. Subsequent action shall be pursuant to the requirements of this LDC.

For the purpose of this LDC, a Change of Use shall be defined as: Any change of the purpose or activity for which a piece of land or its buildings is designed, arranged or intended, or for which it is occupied or maintained.

November 19, 2008 hearing. The Petitioners' claims to the contrary in their petition, they were well aware of who Ms. Lieberman was prior to the hearing on November 19. As noted by the Counsel for the Petitioners in their petition, they appeared before Ms. Lieberman on multiple occasions in 2008, prior to the November 19, 2008 hearing. *See Pet.* at 9. On October 28, 2008, Mr. Lirot and the Petitioners appeared at a public hearing, a regularly scheduled board meeting of the Citrus County Board of County Commissioners, at which time Ms. Lieberman addressed the Board for approximately 20 minutes regarding a matter she was handling on behalf of the County before the Florida Fifth District Court of Appeal. Eight minutes later, Mr. Lirot addresses the Board on behalf of the Petitioners and his co-counsel Mr. Noel Flasterstein. The Circuit Court was asked to take judicial notice of the minutes kept by the Citrus County Court Clerk and of the video of the October 28th meeting. *See Resp. App. A.*

At the November 19, 2008 hearing, Mr. Flasterstein was in attendance on behalf of the Petitioners, and did not make any sort of a motion to have Ms. Lieberman recuse herself from hearing the matter involving the Petitioners and did not address the issue at all. Mr. Flasterstein never made any argument to Ms. Lieberman alleging that sitting in her capacity as special master along with representing Citrus County in other matters before the Fifth District Court of Appeal was a violation of the United States Constitution. After the hearing,

Ms. Lieberman issued her order reaffirming the prior finding of guilt by the Code Enforcement Board and assessed a fine pursuant to Florida Statutes Chapter 162.

Mr. Flasterstein also never addressed either of the issues involved in the second and third questions that the Petitioners presented in their petition during the November 19 hearing. Mr. Flasterstein did not offer any legal argument or evidence that the Petitioners were being "convicted" of a previously uncharged violation in violation of the United States Constitution. Similarly, Mr. Flasterstein never advanced any legal argument regarding the County's Land Development Code being in violation of the United States Constitution during the hearing on November 19.

The Petitioners then took an appeal as a matter of right to the Fifth Judicial Circuit Court pursuant to Florida Statutes section 162.11. However, the Petitioners never make any sort of argument in either their initial brief or their reply brief regarding Ms. Lieberman's representation of the County before the Fifth District Court of Appeal as being a federal Constitutional due process violation.[2] Nor do they make any sort of legal argument regarding the second

---

[2] The Petitioners do make mention of this issue in a pleading before the Circuit Court entitled "Motion to Abate Appeal and Remand with Instructions" but again do not argue any violation of the United States Constitution.

question that they present in their petition to this Court. Rather, the only due process argument that they put forth cites to a few intermediate level state appellate cases and a couple of cases from the Florida Supreme Court. Neither the Fifth nor Fourteenth Amendments to the United States Constitution are cited by the Petitioners in either of their Circuit Court appellate briefs. Similarly, the issue in the third question was never addressed in the Circuit Court appellate briefs filed by the Petitioners.

During oral argument before the Circuit Court on July 13, 2009, Mr. Lirot never addressed the *Caperton* decision,[3] which was issued by this Court on June 8, 2009, and never made any argument that Ms. Lieberman's actions as a special master were in violation of the United States Constitution. Also, Mr. Lirot never addressed the subjects of questions two and three in the petition during the course of the oral argument either. The Circuit Court issued its opinion on August 4, 2009, and nowhere in the opinion did the Circuit Court indicate that it was basing its opinion on federal law or the United States Constitution. Rather, the Circuit Court made it clear in its opinion that it was interpreting Florida law, particularly Florida Statutes Chapter 162 which deals with code enforcement matters, and following

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[3] *Caperton v. A.T. Massey Coal Co., Inc.*, ___ U.S. ___, 129 S. Ct. 2252, 2265-2266 (2009). And Mr. Lirot never filed a notice of supplemental authority with the Circuit Court citing *Caperton* either.

Florida law as previously interpreted by the Florida Supreme Court and the various Florida District Courts of Appeal. *See Pet. App. E* at 35a-46a.

The Petitioners subsequently petitioned the Florida Fifth District Court of Appeal for a writ of certiorari, which the court denied on January 19, 2010, as well as the Petitioners' subsequent request for a rehearing or written opinion which was denied on February 25, 2010. *See Pet. App. F*; *Pet. App. G*. As noted by the Petitioners, the decision of the Fifth District Court of Appeal to deny the petition without issuing a written opinion precluded their appeal to the Florida Supreme Court pursuant to that court's opinion in the *R.J. Reynolds*[4] case and thus their petition for writ of certiorari to this Court followed.

REASONS FOR DENYING THE WRIT

There are multiple reasons for this Court to deny the petition for writ of certiorari in the instant matter, including the fact that the Petitioners failed to preserve a federal claim on appeal, or provide proof that the District Court of Appeal did not deny their petition on state-law grounds, and therefore demonstrate that this Court has jurisdiction to review this matter. Additionally, the Petitioners' questions presented are based on misstatements of facts and

[4] *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986 (Fla. 2004).

the law and, even if they were not and jurisdiction was properly preserved, the Petitioners still do not present a compelling reason for the Court to grant certiorari. Therefore, the Court should deny the petition.

THE PETITIONERS FAILED TO SHOW THAT A FEDERAL CLAIM WAS ADDRESSED BY OR PROPERLY PRESENTED TO THE STATE COURTS IN ORDER TO GIVE THIS COURT JURISDICTION

None of the questions presented to this Court by the Petitioners in their petition were raised at all at the trial level before Special Master Lieberman by attorney Flasterstein, nor were they explicitly raised as Federal Constitutional law questions before the Circuit Court. Consequently, the Petitioners failed to meet their burden by showing that any federal claim was addressed by or properly presented to the state courts below. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997).

Rather, the issue surrounding Ms. Lieberman acting as special master was presented by the Petitioners to the Circuit Court as a matter involving Florida law, particularly the Florida Code of Judicial Conduct. *See Resp. App. B* at 4a-7a. The Petitioners' attorney, Mr. Lirot, did not cite to the United States Constitution, any federal court decisions or any federal statute in either the Petitioners' initial or reply briefs before the Circuit Court regarding this

issue. Nowhere in the petition or the appendix attached thereto did the Petitioners demonstrate that Mr. Lirot brought forward any specific federal question before the Circuit Court at any time.

The Petitioners did take pains to provide the Circuit Court with supplemental authority, on an issue not presently before this Court, approximately one week after the oral argument before the Circuit Court on July 13, 2009. *See Resp. App. C.* What the Petitioners failed to do is provide the Circuit Court with the *Caperton* decision for that court to consider, despite the fact this Court had released the decision in *Caperton* a month prior to the oral argument before the Circuit Court, or any other federal authority. The Petitioners also failed to provide in their petition any specific proof that the Petitioners raised either of the issues raised in the second and third questions presented in their petition before either Ms. Lieberman or before the Circuit Court on appeal.

The only time the Petitioners arguably raised these issues in a federal constitutional context was in their petition for writ of certiorari to the Fifth District Court of Appeal. It was at this stage where they first cited *Caperton*, where they first made the argument that the Citrus County Comprehensive Plan was unconstitutional, and where they make the argument as to the Petitioners being "convicted" of a charge not listed in a charging document. However, other than

Caperton, the Petitioners only cited to one other decision by this Court.[5] Nowhere in the petition did they specifically cite to the Fifth and Fourteenth Amendments of the United States Constitution, and the Due Process Clause is mentioned only once in passing, in a quotation of a holding of this Court within a quotation from a Florida District Court of Appeal case. Instead the Petitioners relied on the greatest extent to Florida state law, and to a lesser extent law from other states in support of their petition.

As this Court has previously held, an issue that was not presented to state courts in such a manner that it was necessarily decided by the highest state court would relieve this Court of the opportunity to take jurisdiction over the matter. *See Street v. New York*, 394 U.S. 576, 581-582 (1969). Here, unlike the Plaintiffs in *Street* and *Gorieb*, the Petitioners failed to properly raise these constitutional issues in the state trial[6] or first tier appellate level courts and

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[5] *Gorieb v. Fox*, 274 U.S. 603 (1927), in which this Court held that an ordinance imposing a set-back requirement was constitutional. The Plaintiff in *Gorieb* presented his arguments that the ordinance was unconstitutional starting in the state trial court, as opposed to the Petitioners in this case. *See id.* at 605.

[6] The Citrus County code enforcement special master is not a judicial officer under Florida law, but rather an administrative hearing officer. *See Fla. Stat. s.* 162.03(2) (2008). The Respondent uses the term "trial court" when referring to the special master in this brief for ease of reference.

instead waited to raise them before the state district court of appeal, one level below the Florida Supreme Court. This is insufficient to properly raise a federal question and therefore this Court is without jurisdiction to hear this matter. *See Street*, 394 U.S. at 582-583; *Raley v. Ohio*, 360 U.S. 423, 434-435 (1959).

THE STATE COURTS HAD ADEQUATE AND INDEPENDENT STATE LAW GROUNDS UPON WHICH TO BASE THEIR DECISIONS

Not only did the Petitioners fail to meet their burden in proving that they had sufficiently raised any federal claim before the state courts or that the state courts had addressed those claims, but at each level the state courts had adequate state law grounds upon which to base their decision. As noted above, the Circuit Court in its order, listed what its responsibilities were in reviewing the actions of Ms. Lieberman: determining whether or not procedural due process was accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment were supported by competent substantial evidence.[7] *See Pet. App. E* at 36a.

The Circuit Court then went through each requirement individually in its opinion, noting that

[7] Citing the Florida Supreme Court case of *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

due process was accorded to the Petitioners in that they admitted they had received notice of the November 19, 2008 hearing and had had the opportunity to be heard before Ms. Lieberman. The Circuit Court went so far as to address the Petitioners' claims against Ms. Lieberman sitting as the special master, noting that Ms. Lieberman was not in violation of Florida Statutes section 162.05(5)[8] due to the fact she was not sitting as the local governing body attorney during the code enforcement matters. The Circuit Court clearly based its analysis on state law, although it did mention this Court's decision in *Tumey v. Ohio*, 253 U.S. 510 (1927) as an aside.[9] *See Pet. App. E* at 37a-39a.

The Circuit Court then discussed whether or not the essential elements of the law were observed by

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[8] *Fla. Stat. s.* 162.05(5) (2008) states: "The local governing body attorney shall either be counsel to an enforcement board or shall represent the municipality or county by presenting cases before the enforcement board, but in no case shall the local governing body attorney serve in both capacities.

Fla. Stat. s. 162.04 (2008) states in pertinent part: "Definitions. – As used in ss. 162.01-162.13, the term: (3) "Local governing body attorney" means the legal counselor for the county or municipality."

Additionally, Florida Statute section 162.03(2) explicitly states that Florida Statute section 162.05 does not apply to special magistrates: "References in this chapter to an enforcement board, except in s. *162.05*, shall include a special magistrate if the context permits." § 162.03(2) *Fla. Stat.* (2008).

[9] However, *Tumey* was never cited by the Petitioners in either of their briefs before the Circuit Court.

Ms. Lieberman and correctly noted that Florida Statutes section 163.3194(1)(a)[10] provides that the County cannot issue a development order (permit) in violation of their adopted comprehensive land use plan and therefore Ms. Lieberman followed the essential elements of the law in finding the Petitioners in violation of the County's Land Development Code regarding changing the use of their property without receiving a development order, an order the County could not issue to the Petitioners (so they could abate the code case) without violating the comprehensive plan. *See Pet. App. E* at 39a-44a. Therefore it is clear the Circuit Court based its analysis of this point on state law.

Finally, the Circuit Court discussed whether or not Ms. Lieberman had competent substantial evidence to issue a fine pursuant to Florida Statutes section 162.09[11] and found that based upon the

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[10] *Fla. Stat. s.* 163.3194 Legal status of comprehensive plan. –

(1)(a) After a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted.

[11] *Fla. Stat. s.* 162.09(1) provides: "An enforcement board, upon notification by the code inspector that an order of the enforcement board has not been complied with by the set time or upon finding that a repeat violation has been committed, may order the violator to pay a fine in an amount specified in this section for each day the violation continues past the date set by

(Continued on following page)

testimony of County witnesses, including the code officer that the Petitioners were not in compliance with the previous order, and the prior finding of guilt by the previously constituted Code Enforcement Board that Ms. Lieberman had competent substantial evidence to issue the fine in this case. *See Pet. App. E* at 44a-46a. Undoubtedly, the Circuit Court had to rely upon state law in its analysis of this point.

When the Fifth District Court of Appeal reviewed the Petitioners' petition for writ of certiorari, their scope of review under Florida law was even narrower. As the Florida Supreme Court held in *Haines City Community Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995), a district court of appeal in reviewing the order of a circuit court acting in its appellate capacity is limited to whether: (1) the circuit court afforded procedural due process and (2) whether the circuit court observed the essential requirements of the law. Clearly, the Fifth District Court of Appeal had independent and adequate state grounds upon which to deny the Petitioners' petition for writ of certiorari and motion for rehearing without issuing a written opinion.[12]

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the enforcement board for compliance or, in the case of a repeat violation, for each day the repeat violation continues, beginning with the date the repeat violation is found to have occurred by the code inspector."

[12] Florida appellate courts have the discretion whether or not to issue written opinions when disposing of cases. *See R.J. Reynolds Tobacco Co.*, 882 So. 2d at 989.

As this Court has previously held, this Court will not accept jurisdiction of a case where the decision below rests on an adequate and independent state ground. *See Michigan v. Long*, 463 U.S. 1032, 1037 (1983). Even if a federal question is decided by the state court, this Court has held that it has no power to review a state law determination, and that even if the Court were to accept jurisdiction as to the federal question, such an opinion would merely be advisory. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies whether the state law ground is substantive or procedural. *See id.* Here, the various state courts had adequate and independent state laws to base their decisions on, whether they were following Florida Statutes Chapter 162, or case law of the Florida Supreme Court.

Therefore, as the Petitioners have not met their burden of showing that any of the federal due process issues were properly presented to the state courts, and as the state courts demonstrably had adequate and independent state law grounds upon which to address those issues even if the Petitioners had met such burden, the Respondent would submit that the Court is without jurisdiction to hear these matters and should deny the petition for writ of certiorari.

THE MERITS QUESTIONS PRESENTED BY THE PETITIONERS DO NOT WARRANT REVIEW BY THE COURT

The merits questions presented by the Petitioners to the Court do not warrant review by the

Court because they are based on either misstatements of the facts or the law.

Ms. Lieberman was not the Attorney Representing Citrus County in the Code Enforcement Case Against the Petitioners and *Caperton* is Inapplicable as Precedent

The Petitioners' first merits question involves both misstatements of law and the facts. The Petitioners have continually argued that Ms. Lieberman, while representing Citrus County on totally separate and distinct cases before the Florida Fifth District Court of Appeal, was not legally able to serve as the code enforcement special master under Florida law. The facts are, however, that Ms. Lieberman was not serving as the local governing body attorney during the code enforcement case against the Petitioners. Rather it was the undersigned counsel of record who has been representing Citrus County at every step of this matter since February 2008, which the Petitioners' attorney, Mr. Lirot, actually acknowledged during the oral argument before the Circuit Court.

Florida Statutes section 162.04 (2008) reads:

> Definitions.—As used in ss. 162.01-162.13, the term:
>
> (1) "Local governing body" means the governing body of the county or municipality, however designated.

> (2) "Code inspector" means any authorized agent or employee of the county or municipality whose duty it is to assure code compliance.
>
> (3) "Local governing body attorney" means the legal counselor for the county or municipality.
>
> (4) "Enforcement board" means a local government code enforcement board.
>
> (5) "Repeat violation" means a violation of a provision of a code or ordinance by a person who has been previously found through a code enforcement board or any other quasi-judicial or judicial process, to have violated or who has admitted violating the same provision within 5 years prior to the violation, notwithstanding the violations occur at different locations.

The Petitioners consistently fail to address the part of the statute that reads "as used in ss. 162.01-162.13" in their argument that the statute applies to Ms. Lieberman based upon her representation of Citrus County in non-code enforcement appellate level cases. A plain reading of the statute makes it clear that the term "local governing body attorney" only applies to attorneys representing the local governing body in code enforcement proceedings, as those are the proceedings addressed in the above noted statutory sections. None of the bills submitted in the appendix by the Petitioners can demonstrate that Ms. Lieberman ever represented Citrus County

in any code enforcement proceeding at the same time as she was serving as Citrus County's code enforcement special master. Further, it has always been the position of the Respondent that the Petitioners waived this issue under state law due to the fact that they were aware of Ms. Lieberman's representation of the County before the Fifth District Court of Appeal prior to the hearing on November 19, 2008 and failed to make a motion to have her recuse herself.[13]

Additionally, the holding in *Caperton* is inapplicable to the situation in this matter. As noted by the Petitioners, this Court recognized that the circumstances in *Caperton* were extreme and that the holding in that case (and all other judicial recusal cases) was limited to those specific circumstances.[14] *See Caperton*, 129 S. Ct. at 2265-2266. In reaching the holding in *Caperton*, this Court addressed two instances where the Court has previously held judicial recusal was constitutionally required: (1)

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[13] *See In Re: Estate of Carlton v. Rogers*, 378 So. 2d 1212 (Fla. 1980) in which the Florida Supreme Court held that it is a "general rule of law that a party waives any grounds for disqualification of a judge or justice when the suggestion is not filed within a reasonable period of time after having knowledge of such grounds." *Id.* at 1218. The Court went on to hold that "[a]llowing a party to request disqualification after a decision has been rendered by the Court provides a second opportunity to achieve a favorable result when the first decision is adverse, an opportunity not available to the opposing party." *Id.*

[14] The holding of which was addressed and restated again by the Court a few months ago in *Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S. Ct. 876, 910 (2010).

where a judge in a local tribunal has a direct financial interest in the outcome of a case, and (2) where a judge has no pecuniary interest in a case, but was challenged due to a conflict arising from the judge's participation in an earlier proceeding. *See id.* at 2259-2261.

In this particular case, the factual circumstances do not approach anything remotely described in *Caperton*, *Tumey* or *Murchison*.[15] The Petitioners cannot demonstrate that Ms. Lieberman has a direct financial interest in the outcome of the case against them, such as the issuance of the fines by the mayor in *Tumey* which went to directly supplement his salary. One would think if this was truly the case, then Ms. Lieberman would have imposed the full fine amount of $70,250 as accrued at the time against the Petitioners rather than the reduced amount of $25,000 that she did impose. *See Pet. App. C* at 14a-15a. In addition, it was not Ms. Lieberman who decided to issue a notice of violation against the Petitioners and then sit as the hearing officer to decide the matter similar to *Murchison*.

Therefore, this question does not fit the criteria for review by the Court due to the failure of the Petitioners to demonstrate that there is even a rational basis to find an appearance of bias on the part of Ms. Lieberman and the Court should deny the petition for writ of certiorari on this point.

[15] *In Re: Murchison*, 349 U.S. 133 (1955).

The Petitioners Were Not "Convicted" for an Alleged Violation Not Included in the "Charging Instrument"

The documentation provided by the Petitioners in the appendix to their petition is sufficient to show that the Petitioners have misstated the facts on this particular merits question as well as the law. The administrative complaint filed by Code Inspector William Harms on September 28, 2007 informs the Petitioners that (among other things) the Petitioners are being cited for a violation of Section 2021 of the Citrus County land development regulations for changing the use of their property without permits. *See Pet. App. A-1* at 1a-2a. The order entered by the Citrus County Code Enforcement Board shows that the Petitioners were found in violation of the Citrus County Land Development Code for engaging in a change of use of their property without obtaining permits. *See Pet. App. B* at 7a-9a.

The order entered by Ms. Lieberman clearly notes that the Petitioners were previously found guilty of violating Section 2021 by the Code Enforcement Board and remained in violation at the time of the order. *See Pet. App. C* at 10a-16a. Therefore, it is beyond dispute that the Petitioners were "convicted" of violating Section 2021 by the Code Enforcement Board and that Ms. Lieberman, following the law of the State of Florida, used her discretion at that time based upon the evidence provided at the hearing to issue a fine for the days that the Petitioners' property had been in violation of

the requirements of the Citrus County Land Development Code. *See Fla. Stat. s.* 162.09(1); *Pet. App. C* at 10a-16a.

The Petitioners were never "convicted" of violating the Citrus County Comprehensive Plan contrary to the argument put forth in their petition. The issue surrounding the testimony regarding the setback requirement in the comp plan actually came up regarding the Petitioners' efforts to abate the land development code violation and whether or not Citrus County would be able to issue a change of use permit to the Petitioners. As noted by Ms. Lieberman in her order, due to the fact the Petitioners' structure sits within the 15 foot setback area required under the comp plan, the County cannot legally issue a permit for the structure and thus the Petitioners cannot abate the code violation by receiving their change of use permit.[16] *See Pet. App. C* at 12a.

Therefore, it is the position of the Respondent that the Court should not entertain the question as

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[16] The Petitioners included an affidavit prepared by their retained architect Thomas Williford in the appendix to their petition where Mr. Williford gives testimony as to his measurements of the setback area. As the Court will note, the date on the affidavit is September 14, 2009, well after the hearings that took place in this matter and the affidavit was therefore never introduced into evidence before Ms. Lieberman at the underlying hearing on this matter. It is not a part of the record of the proceedings of this case and the Respondent would request that the Court not give it any weight in its consideration of the petition.

presented by the Petitioners due to the fact that the Petitioners were found in violation of a provision of the Citrus County Land Development that they were duly notified of. The Petitioners received all of the substantive and procedural due process rights they were entitled to under the Constitution and the Court should deny the petition for writ of certiorari on this point.

The Citrus County Comprehensive Plan can be Amended and is Therefore Constitutional

As noted above in this brief, the Petitioners failed to properly preserve this issue for review by the Court. However, should the Court decide that is has jurisdiction to review this issue, the Court will find that the Petitioners have misstated the law and facts on this matter in regards to their ability to seek an amendment to the Citrus County Comprehensive Plan.

Florida Statutes Chapter 163, Part II lists the laws enacted by the Florida Legislature regarding growth management and land use planning in the State of Florida. Included in Chapter 163, Part II is statute section 163.3161, which lists the legislature's policy reasons for adopting the "Local Government Comprehensive Planning and Land Development Regulation Act". Chief among the policy reasons listed is the legislature's recognition that local governments need to have the ability to control growth and the uses of land within their jurisdictions

in order to provide for the protection of the public health, safety, comfort, and good order and to make sure that services can be provided in an efficient manner to the citizens within the jurisdiction. *See Fla. Stat. s.* 163.3161(3) (2008).

Florida Statue section 163.3161(5) (2008) specifically provides that "no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act." *See also Fla. Stat. s.* 163.3194(1)(a) (2008). The law also requires that each local government establishes and enacts a local comprehensive plan in accordance with Chapter 163, Part II. *See Fla. Stat. s.* 163.3167(2) (2008). However, this does not mean that the elements of a previously adopted comprehensive plan cannot be amended, and in fact the legislature set out a process to allow anyone to seek to have a local comprehensive plan amended. *See Fla. Stat. s.* 163.3181 (2008). So while the Petitioners could not seek a variance issued by County staff as such a variance would be in violation of the comprehensive plan, a county ordinance, they could seek to have the comprehensive plan amended.

In fact, the Petitioners did attempt to have the comprehensive plan amended and have their property rezoned to a commercial land designation and were denied. *See Resp. App. D.* Additionally, the Petitioners had the opportunity to challenge the denial of their proposed comprehensive plan amendment, but failed to do so. *See Fla. Stat. s.* 163.3187(3)(a) (2008). Thus,

the Petitioners had multiple opportunities to obtain relief and were denied in one instance and failed to take the opportunity in another, and therefore their claims of due process violations ring very hollow.

The Petitioners' reliance on *Gorieb* and *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) is misplaced. In *Gorieb*, this Court reaffirmed its' holding in *Euclid* and stated that:

> Comprehensive zoning laws and ordinances, prescribing, among other things, the height of buildings to be erected and the extent of the area to be left open for light and air, and in aid of fire protection, etc., are, in their general scope, valid under the federal Constitution. It is hard to see any controlling difference between regulations which require the lot owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street.

Gorieb, 274 U.S. at 608.

The Petitioners claim that the holding in *Gorieb* is that variances from zoning ordinances are constitutionally required. However, a more accurate reading of *Gorieb* is that the holding is not that variances are required under the Constitution, but rather that local governments have the discretion to reserve authority to provide variances in "exceptional cases" when enacting their ordinances and that

ordinances that allow such variances are constitutional until they are challenged and determined to be otherwise. *Id.* at 607-610.

Accordingly, it is the position of the Respondent that the Court should not entertain the question as presented by the Petitioners due to the fact that the Citrus County Comprehensive Plan is not in violation of the Constitution and the Court should deny the petition for writ of certiorari on this point.

The Petitioners Failed to Demonstrate a Compelling Reason for the Court to Grant Certiorari

The granting of petition for a writ of certiorari is one of complete judicial discretion on the part of the Court. As the Court has previously held, "special and important" reasons for the Court to grant certiorari must be presented by the petitioner before the Court will grant such a writ. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). Currently, Rule 10 of the Court's Rules states that "[a] petition for a writ of certiorari will be granted only for compelling reasons" and then goes on to list the character of the reasons the Court considers. *Sup. Ct. R.* 10. While the reasons noted do not control the Court's discretion, they certainly provide guidance to parties seeking the Court's review as to the reasons the Court would grant certiorari and therefore one would assume that a party would address those concerns in their petition.

The Petitioners in this matter have utterly failed to demonstrate that the Florida Fifth District Court of Appeal decided an important federal question in a way that conflicts with another state court of last resort or a United States court of appeals. *See Sup. Ct. R.* 10(b). Moreover, the Petitioners have failed to demonstrate that any state court in this matter decided an important question of federal law that has not been settled by this Court or in a way that conflicts with relevant decisions of this Court. *See Sup. Ct. R.* 10(c); *Rice*, 349 U.S. at 74.

Rather, the Petitioners have urged the Court to grant certiorari review of this matter in order to provide "much needed guidance" to land owners, the general public and local governments regarding proper code enforcement procedures. *Pet.* at 40-42. However, this Court has previously held that it does not sit for the purpose of considering such abstract issues absent a substantive federal question. *See Rice*, 349 U.S. at 74. Therefore, as the Petitioners have failed to demonstrate that there is a compelling reason for this Court to grant certiorari pursuant to Rule 10, the Court should deny the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GREGG R. BRENNAN
Assistant County Attorney
Counsel of Record

RICHARD WM. WESCH
County Attorney

Office of the County Attorney
Citrus County, Florida
110 N. Apopka Ave.
Inverness, Florida 34450
(352) 341-6560

APPENDIX A

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR CITRUS COUNTY, FLORIDA

JOHN LAWSON and JO ANNE LAWSON,

Appellants,

v.

CITRUS COUNTY, a political Subdivision of the State of Florida,

Appellee,

_____/

Case Number: 2008-CA-007192
CE Case Number: 0707-007

REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE

COMES NOW the Appellee, CITRUS COUNTY, a political subdivision of the State of Florida, by and through their undersigned counsel, pursuant to Florida Statutes sections 90.202 and 90.203 to request that the Court take judicial notice of the following materials in the Court's consideration of this matter:

1. The minutes of the Regular Meeting of the Citrus County Board of County Commissioners for October 28, 2008. *See* Exhibit "A". Said minutes were officially approved by the Citrus County Board of County Commissioners during the Regular Meeting on December 16, 2008 and said minutes are kept

by the Citrus County Clerk of Court. *See* Exhibit "B".

2. The video recording of the Regular Meeting of the Citrus County Board of County Commissioners for October 28, 2008, which is kept and maintained by the Citrus County Clerk of Court and available to the public through that office's website at: http://citrus.granicus.com/ViewPublisher.php?view_id=2.

Respectfully submitted,

/s/ Gregg R. Brennan
Gregg R. Brennan
Assistant County Attorney
Attorney for the Appellee,
Citrus County
FBN: 296340
110 N. Apopka Ave.
Inverness, Florida 34450
(352) 341-6560 (phone)
(352) 341-6585 (fax)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document and all attachments have been furnished via U.S. Mail to Luke C. Lirot, Esq., attorney for the Appellants, 2240 Belleair Rd., Ste. 190, Clearwater, FL 33764 this 7th day of July, 2009.

/s/ Gregg R. Brennan
Gregg R. Brennan
Assistant County Attorney
FBN: 296340

APPENDIX B

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR CITRUS COUNTY, STATE OF FLORIDA CIRCUIT CIVIL DIVISION

JOHN LAWSON and JO ANNE LAWSON,

Appellants,

v.

CITRUS COUNTY, a political Subdivision of the State of Florida,

Appellee,

/

Appeal Case Number: 2008-CA-007192 CE
Case Number: 0707-007

(Filed Jul. 10, 2009)

APPELLANTS' REQUEST FOR JUDICIAL NOTICE AND NOTICE OF FILING SUPPLEMENTAL AUTHORITY

The Appellants, JOHN LAWSON and JO ANNE LAWSON, by and through their undersigned counsel, hereby file with the Court this Request for Judicial Notice and Notice of Filing Supplemental Authority, and state as follows:

Request for Judicial Notice

Pursuant to Florida Statutes § 90,202, Appellants respectfully request this Court to take judicial

notice of the following records of the Citrus County Attorney's Office:

1. Invoices from Michele Lieberman, Esq., from October 31, 2007 through May 5, 2009 showing her employment by the County Attorney's office at the same time she was sitting as a Code Enforcement Special Master in the subject matter. (Exhibit A) These invoices total over $25,000 in the period October 31, 2007 through May 5, 2009 and do not include invoices submitted to Citrus County by Ms. Lieberman for her services as a Code Enforcement Special Master.

2. An invoice from Michele Lieberman to Citrus County dated June 30, 2008, which details an *ex parte* meeting with the County staff less than three weeks before she first presided as the Code Enforcement Special Master hearing the subject case. (Exhibit B) Exhibit B also describes a "discussion with client: PA [presumably Senior Assistant County Attorney Peter Aare] re. conflicts," one week before the day she first presided over the subject matter.

Notice of Supplemental Authority

In its Answer Brief, Citrus County asks this Court to accord a "presumption of correctness" to the Code Enforcement Special Master using the analogy of a trial court (Answer Brief at page 6). Appellants thus submit as supplemental authority The *Florida Code of Judicial Conduct* which applies:

Anyone, whether or not a lawyer, who performs judicial functions, including **but not limited to** a civil traffic infraction hearing officer, court commissioner, general or special magistrate, domestic relations commissioner, child support hearing officer, or judge of compensation claims, shall, while performing judicial functions, conform with Canons 1, 2A, and 3, and such other provisions of this Code that might reasonably be applicable depending on the nature of the judicial function performed. [Emphasis Added]

In turn, Canons 2 and 3 provide:

Canon 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities

Canon 3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.

. . .

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

. . .

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

Canon 5, also applicable to someone holding a position such as a Code Enforcement Special Master, provides:

> Canon 5. A Judge Shall Regulate Extrajudicial Activities to Minimize the Risk of Conflict with Judicial Duties
>
> A. Extrajudicial Activities in General. A judge shall conduct all of the judge's extra judicial activities so that they do not:
>
> (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
>
> (2) undermine the judge's independence, integrity, or impartiality;

Respectfully submitted,

/s/ Luke Lirot

Luke Lirot, Esquire
Florida Bar Number 714836
Bryan R. Snyder, Esquire
Florida Bar Number 042340
Luke Charles Lirot, P.A.
2240 Belleair Road,
Suite 190
Clearwater, Florida 33764
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Facsimile: (727) 536-2110
Email: luke2@lirotlaw.com/
bryan@lirotlaw.com
Counsel for the Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via [✓] ~~U.S. mail~~, [✓] facsimile ~~FEDEX OVERNIGHT DELIVERY~~ Hand Delivery, and/or [✓] ~~hand delivery~~ to Citrus County Attorney's Office, 110 N. Apopka Avenue, Inverness, Florida 34450, on this 10th day of July, 2009.

/s/ Luke Lirot
Luke Lirot, Esquire
Florida Bar Number 714836

APPENDIX C

[LOGO] **LUKE CHARLES LIROT, P.A.** [LOGO]
ATTORNEYS AND COUNSELORS AT LAW
2240 BELLEAIR ROAD, SUITE 190
CLEARWATER, FLORIDA 33764
(727) 536-2100 TEL (727) 536-2110 FAX

July 20, 2009

Via U.S. Mail
The Honorable Patricia V. Thomas
Citrus County Courthouse
110 North Apopka Avenue
Inverness, Florida 34450-4299

Re: *Lawson v. Citrus County, Appeal Number 2008 CA 007192*

Dear Judge Thomas:

Following up on the oral argument held on July 13, 2009, in the above-referenced matter, enclosed please find copies of *ABC Liquors, Inc. v. City of Ocala*, 366 So.2d 146 (Fla. 1st DCA 1979) and *Effie, Inc. v. City of Ocala*, 438 So.2d 506 (Fla. 5th DCA 1983), for your consideration. As your Honor may recall, I indicated that I would provide copies of these cases as supplemental authority with respect to the issue of, even as "highly regulated businesses," alcoholic beverage facilities are still entitled to the requirements of due process, and even though communities have significant powers over businesses that enjoy the privilege of serving alcohol, such governmental powers

do not cover any relaxation of basic due process rights.

Additionally, in light of the voluminous record in this matter, and the fact that many of my arguments were predicated on the specific contents of the cavalcade of orders related to the code enforcement issue, to save the Court the necessity of digging through the record to find same, I have taken the liberty of summarizing the parts of the record regarding the dates of the many public hearings held in the code enforcement matter, the dates of any applicable orders, and the appropriate citations to the record:

Date of Public Hearing	**Date of Order**	**Record Citation**
December 19, 2007	December 26, 2007	Vol. I, Doc. 34
March 19, 2008	March 27, 2008	Vol. I, Doc. 35
June 18, 2008	June 27, 2008	Vol. I, Doc. 36
August 20, 2008	September 18, 2008	Vol. I, Doc. 37
November 19, 2008	December 9, 2008	Vol. I., Doc. 7

For the sake of ease and efficiency, I have also enclosed copies of the aforementioned orders, which are already contained in the record as indicated

above. If you have any questions or concerns, please feel free to contact my office. Thank you for your consideration.

Very truly yours,

/s/ Luke Lirot
Luke Lirot, Esquire

Enclosures

Cc: Gregg Brennan, Esq.

APPENDIX D

ORDINANCE NO. 2009-A12

AN ORDINANCE OF CITRUS COUNTY, FLORIDA, AMENDING THE CITRUS COUNTY COMPREHENSIVE PLAN, ORDINANCE NO. 89.04 AS AMENDED, BY REVISION TO THE GENERALIZED FUTURE LAND USE MAP AS PRESENTED HEREIN BELOW; PROVIDING FOR SEVERABILITY; PROVIDING FOR INCLUSION AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Citrus County Board of County Commissioners recognize the need to plan for orderly growth and development while protecting Citrus County's abundant natural resources, and

WHEREAS, the Board of County Commissioners adopted the Citrus County Comprehensive Plan, Ordinance No. 89-04 on April 18, 1989, and subsequent amendments, and

WHEREAS, Chapter 163, Florida Statutes and Chapter 9J-5, Florida Administrative Code provide for the amendment of the Comprehensive Plan,

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF CITRUS COUNTY, FLORIDA AS FOLLOWS:

SECTION 1. SHORT TITLE

THIS ORDINANCE shall be known as, cited as, and referred to as the "Citrus County Comprehensive Plan 2009 Small Scale Review Third Small Scale Cycle Amendment", and shall be effective within the unincorporated areas of Citrus County, Florida.

SECTION 2. AUTHORITY

This "Citrus County Comprehensive Plan 2009 Third Small Scale Cycle Amendment" is adopted pursuant to Chapter 163, Florida Statutes.

SECTION 3. REVISIONS AND ADDITIONS TO THE GENERALIZED FUTURE LAND USE MAP (GFLUM)

CPA-09-12 R. Bruce McLaughlin for John and JoAnne Lawson (Cedar Key Fish House, a.k.a. The Freezer)

Re-designation from CLC, Coastal and Lakes Commercial District, to CL, Low Intensity Coastal and Lakes District for Lot 7 and portions of Lots 2, 3, 5, and 6 of Block 6, Lot 1 of Block 7, and Lot 2 of Block 15, together with vacated roads and alleys of Town Plat of Homosassa recorded in Plat Book 1, Page 6 located in Section 31, Township 19 South, Range 17 East, as presented in Application CPA-09-12 and as further fully described in Exhibit "A" attached hereto and incorporated herein by reference.

SECTION 4. SEVERABILITY

If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held illegal, invalid or unconstitutional by the decision of any court or regulatory body of competent jurisdiction, such decision shall not affect the validity of the remaining portions hereof. The Board of County Commissioners hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause or phrase hereof, irrespective of the fact that any one or more section, subsections, sentences, causes, or phrases be declared illegal, invalid or unconstitutional and all ordinances and parts of ordinances in conflict with the provisions of the ordinance are hereby repealed.

SECTION 5. INCLUSION IN THE COMPREHENSIVE PLAN

It is the intention of the Board of County Commissioners of Citrus County, Florida, and it is hereby provided that the provisions of this Ordinance shall become and be made a part of the Citrus County Comprehensive Plan (Citrus County. Ordinance No. 89-04). To this end, the sections of this Ordinance may be renumbered or relettered to accomplish such intention, and that the word "ordinance" may be changed to "section", "article", "policy" or other appropriate designation.

SECTION 6. EFFECTIVE DATE

This ordinance shall not become effective until 31 days after adoption. However, if challenged within 30 days after adoption, this ordinance shall not become effective until the state land planning agency or the Administration Commission issues a final order determining that the adopted small scale development amendment is in compliance with the Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Part II, Florida Statutes.

DONE AND ADOPTED In regular meeting of the Board of County Commissioners of Citrus County, Florida, this 21st day of July 2009.

BOARD OF COUNTY COMMISSIONERS OF CITRUS COUNTY, FLORIDA

BY: /s/ John Thrumston
JOHN THRUMSTON, CHAIRMAN

ATTEST:

/s/ Theresa Steelfox, DC
for **BETTY STRIFLER, CLERK**

**APPROVED AS TO FORM
FOR THE RELIANCE OF
CITRUS COUNTY ONLY.**

/s/ Robert Battista [SEAL]
COUNTY ATTORNEY

APPENDIX D

EXHIBIT A

CPA-09-12 R. Bruce McLaughlin for John and JoAnne Lawson (Cedar Key Fish House, a.k.a. The Freezer)

Re-designation from CLC, Coastal and Lakes Commercial District, to CL, Low Intensity Coastal and Lakes District for Lot 7 and portions of Lots 2, 3, 6, and 8 of Block 6, Lot 1 of Block 7, and Lot 2 of Block 15, together with vacated roads and alleys of Town Plat of Homosassa recorded in Plat Book 1, Page 6 located in Section 31, Township 19 South, Range 17 East, as presented in Application CPA-09-12 and as further fully described as follows:

A PORTION OF LOTS 2, 3, 5, AND 6, AND A PORTION OF THE ALLEY AS DESCRIBED IN OFFICIAL RECORD BOOK 431, PAGE 813, PUBLIC RECORDS OF CITRUS COUNTY, FLORIDA, ADJACENT THERETO, AND A PORTION OF BAY STREET, OF TOWN PLAT OF HOMOSASSA, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN PLAT BOOK 1, PAGE 6, PUBLIC RECORDS OF CITRUS COUNTY, FLORIDA, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS: BEGIN AT THE SOUTHWEST CORNER OF LOT 6, BLOCK 6, OF TOWN PLAT OF HOMOSASSA, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN PLAT BOOK 1, PAGE 6, PUBLIC RECORDS OF

CITRUS COUNTY, FLORIDA, THENCE S. 82 DEGREES 05' W. ALONG THE SOUTH LINE OF SAID LOT 6 AND A SOUTHWESTERLY PROJECTION THEREOF A DISTANCE OF 140 FEET, THENCE S. 7 DEGREES 55' E. 232 FEET, MORE OR LESS, TO THE WATERS OF OTTER CREEK, THENCE ALONG SAID WATERS THE FOLLOWING COURSES AND DISTANCES: S. 85 DEGREES W. 72 FEET, THENCE N. 47 DEGREES 05' 44" W. 36.55 FEET, THENCE N. 3 DEGREES 56' 09" E. 119.18 FEET TO A POINT ON THE SOUTHERLY WATERS EDGE OF AN EXISTING CANAL, THENCE N. 87 DEGREES E. ALONG SAID WATERS A DISTANCE OF 220 FEET, MORE OR LESS, TO A POINT ON THE EAST LINE OF SAID BLOCK 6, THENCE S. 2 DEGREES 51' E. ALONG SAID EAST LINE A DISTANCE OF 98.12 FEET, MORE OR LESS, TO THE POINT OF BEGINNING.

AND

LOT 7, BLOCK 6, OF TOWN PLAT OF HOMOSASSA, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN PLAT BOOK 1, PAGE 6, PUBLIC RECORDS OF CITRUS COUNTY, FLORIDA, AND A PORTION OF VACATED BAY STREET ADJACENT THERETO.

AND

LOT 1, BLOCK 7, OF TOWN PLAT OF HOMOSASSA, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN PLAT BOOK 1,

PAGE 6, PUBLIC RECORDS OF CITRUS COUNTY, FLORIDA, COMMONLY KNOWN AS THE "OLD MAP," AND A PORTION OF THE ALLEY AS DESCRIBE DIN OFFICIAL RECORD BOOK 679, PAGE 1748, PUBLIC RECORDS OF CITRUS COUNTY, FLORIDA.

AND

THE NORTHERLY 1/2 OF THAT PORTION OF VACATED CREEK AVENUE, ALSO KNOWN AS LANE, LYING SOUTHWESTERLY OF BOULEVARD AND NORTHEASTERLY OF A SOUTHEASTERLY PROJECTION OF THE MOST WESTERLY LINE OF LOT 1, BLOCK 7, OF TOWN PLAT OF HOMOSASSA, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN PLAT BOOK 1, PAGE 6, PUBLIC RECORDS OF CITRUS COUNTY, FLORIDA.

AND

COMMENCE AT THE SOUTHWEST CORNER OF LOT 1, BLOCK 7, OF TOWN PLAT OF HOMOSASSA, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN PLAT BOOK 1, PAGE 6, PUBLIC RECORDS OF CITRUS COUNTY, FLORIDA, THENCE SOUTH ON A PROJECTION OF THE WEST LINE OF LOT 1 TO THE CENTER OF CREEK AVENUE FOR THE POINT OF BEGINNING, THENCE CONTINUE ON A PROJECTION OF THE WEST LINE OF LOT 1 TO THE NORTH LINE OF LOT 13, BLOCK 7, THENCE NORTHEAST ALONG

THE NORTH LINE OF LOT 13 TO THE NORTHEAST CORNER OF SAID LOT, THENCE NORTH ALONG A PROJECTION OF THE EAST LINE OF LOT 13 TO THE CENTER OF CREEK AVENUE, THENCE SOUTHWEST TO THE POINT OF BEGINNING.

AND

BEGIN AT THE NORTHEAST CORNER OF LOT 13, BLOCK 7, OF TOWN PLAT OF HOMOSASSA, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN PLAT BOOK 1, PAGE 6, PUBLIC RECORDS OF CITRUS COUNTY FLORIDA, THENCE SOUTHWEST ALONG THE NORTH LINE OF SAID LOT 13, 50 FEET TO A POINT, THENCE SOUTHEAST TO THE SOUTHEAST CORNER OF LOT 13, THENCE NORTH ALONG THE EAST LINE OF SAID LOT TO THE POINT OF BEGINNING.

AND

LOT 2, BLOCK 15, OF TOWN PLAT OF HOMOSASSA, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN PLAT BOOK 1, PAGE 6, PUBLIC RECORDS OF CITRUS COUNTY, FLORIDA.

AND

A PORTION OF BOULEVARD AS SHOWN ON TOWN PLAT OF HOMOSASSA, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN PLAT BOOK 1, PAGE 6, PUBLIC RECORDS

OF CITRUS COUNTY, FLORIDA, AND ALSO SHOWN ON CITRUS COUNTY PRESCRIPTIVE ROAD PLAT BOOK 1, PAGES 23 THROUGH 31, PUBLIC RECORDS OF CITRUS COUNTY, FLORIDA, DESCRIBED AS FOLLOWS: COMMENCE AT THE MOST NORTHERLY CORNER OF LOT 13, BLOCK 7, TOWN PLAT OF HOMOSASSA, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN PLAT BOOK 1, PAGE 6, PUBLIC RECORDS OF CITRUS COUNTY, FLORIDA, AND ALSO SHOWN ON CITRUS COUNTY PRESCRIPTIVE ROAD PLAT BOOK 1, PAGES 23 THROUGH 31, PUBLIC RECORDS OF CITRUS COUNTY, FLORIDA, SAID POINT BEING ON A CURVE CONCAVED NORTHEASTERLY HAVING A CENTRAL ANGLE OF 21 DEGREES 17' 56" AND A RADIUS OF 1374.32 FEET, SAID POINT ALSO BEING ON THE SOUTHWESTERLY RIGHT-OF-WAY LINE OF BOULEVARD AS SHOWN ON SAID TOWN PLAT OF HOMOSASSA AND S. BOULEVARD DRIVE AS SHOWN ON SAID CITRUS COUNTY PRESCRIPTIVE ROAD PLAT AND SAID POINT ALSO BEING ON THE NORTHEASTERLY LINE OF VACATED OAK LANE AS RECORDED IN OFFICIAL RECORD BOOK 211, PAGE 585, PUBLIC RECORDS OF CITRUS COUNTY, FLORIDA, THENCE NORTHWESTERLY ALONG THE ARC OF SAID CURVE AND ALONG SAID SOUTHWESTERLY RIGHT-OF-WAY LINES AND ALONG SAID NORTHEASTERLY LINE OF VACATED OAK LANE A DISTANCE OF 41.52

FEET TO THE POINT ON SAID CURVE, SAID POINT BEING THE POINT OF BEGINNING (CHORD BEARING AND DISTANCE BETWEEN SAID POINTS BEING N. 16 DEGREES 01' 23" W. 41.52 FEET), THENCE CONTINUE NORTHWESTERLY ALONG THE ARC OF SAID CURVE AND ALONG SAID SOUTHWESTERLY LINES OF BOULEVARD AND S. BOUEIVARD DRIVE AND SAID CURVE, SAID POINT BEING THE SOUTHEASTERLY CORNER OF LOT 1 OF SAID BLOCK 7 (CHORD BEARING AND DISTANCE BETWEEN SAID POINTS BEING N. 14 DEGREES 53' 16" W. 12.93 FEET), THENCE CONTINUE NORTHWESTERLY ALONG THE ARC OF SAID SURVE AND ALONG SAID SOUTHWESTERLY LINES OF BOULEVARD AND S. BOULEVARD DRIVE AND ALONG THE EASTERLY LINE OF SAID LOT 1 A DISTANCE OF 35.81 FEET TO A POINT ON SAID CURVE (CHORD BEARING AND DISTANCE BETWEEN SAID POINTS BEING N. 13 DEGREES 52' 19" W. 35.81 FEET), THENCE S. 57 DEGREES 26' 56" E. 30.61 FEET, THENCE S. 14 DEGREES 08' 29" E. 6.66 FEET, THENCE S. 32 DEGREES 33' 04" W. 28.86 FEET TO THE POINT OF BEGINNING.